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APPENDIX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 702

RONALD L. JOHNSON, PETITIONER,

vs.

MASSACHUSETTS

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR CERTIORARI FILED JUNE 26, 1967

CERTIORARI GRANTED OCTOBER 9, 1967

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No. 8478
(5226 of 1963)

DOCKET ENTRIES

COMMONWEALTH

vs.

RONALD L. JOHNSON
HERBERT GRAVES, JR.

Charge		Attorney
Murder—First Degree	10/11/63 NEIL COLIOCHIO (For Johnson) (By Court) 10/15/63 JOSEPH J. BALLIRO (For Graves) (By Court)	6/16/64 JOHN M. HARRINGTON, JR. 50 Federal Street (For Johnson)

No. of Paper	Date	
1	Aug. 6, 1963	Indictment returned.
	Aug. 7, 1963	Copy of indictment and notice of finding of indictment sent to Chief Justice and Attorney General as to each.
		Copy of indictment, notice of finding of indictment and notice that indictment would be entered forthwith on docket of this Court sent by Clerk to Sheriff for service on defendants in Common Jail, Suffolk County.
		Notice sent to Department of Mental Health as to each.
2–3	Aug. 8, 1963	Order of notice with return of service on Johnson and Graves endorsed thereon received from Sheriff.
4–5	Aug. 16, 1963	Report received from Department of Mental Health as to each.

No. of Paper	Date	
4–5	Aug. 16, 1963	Johnson ordered committed to Bridgewater State Hospital at Massachusetts Correctional Institution, Bridgewater, for thirty-five days observation pending the determination of his mental condition. Sgarzi, J.
		Order of commitment to said Bridgewater State Hospital for thirty-five days observation, revoked. (Johnson confined in Boston City Hospital.) Sgarzi, J.
6	Oct. 11, 1963	Johnson brought into Court—motion for assignment of Neil Colicchio, as counsel, filed and allowed. Paquet, J.
7		Affidavit of Neil Colicchio filed in accordance with Rule #95.
	Oct. 11, 1963	Johnson stands mute upon arraignment and Courts directs plea of not guilty be entered. Johnson ordered committed to Bridgewater State Hospital, Massachusetts Correctional Institution, Bridgewater, for thirty-five days observation pending the determination of his mental condition. Mittimus issued.
		Johnson ordered committed to Jail without bail. Paquet, J.—Mittimus issued.
		Richard L. Lotreck, official stenographer.
8	Oct. 15, 1963.	Graves brought into Court—motion for assignment of Joseph J. Balliro, as counsel, filed and allowed. Paquet, J.
8A		Affidavit of Joseph J. Balliro filed in accordance with Rule #95.

No. of Paper	Date	
8 8A	Oct. 15, 1963	Graves stands mute upon arraignment and Court directs plea of not guilty be entered. Court allows Graves thirty days for filing of special pleas. Graves ordered committed to Jail without bail. Paquet, J. Richard L. Lotreck, official stenographer. Mittimus issued.
9	Nov. 12, 1963	Report received from Acting Director of Clinical Psychiatry of said Bridgewater State Hospital, as to Johnson—Johnson returned to Jail.
10–19 incl.	Dec. 13, 1963	Johnson and Graves each file motions for bill of particulars—motions for copy of defendants' statements to Police—motions for appointment of investigator—motions for copy of minutes of Grand Jury—motions for copy of autopsy report.
20		Johnson files motion for appointment of psychiatrist. Donahue, J., and District Attorney notified.
	Jan. 8, 1964	Hearing on motions filed December 13, 1963—motions for bill of particulars and motions for copy of minutes of Grand Jury denied; motions for appointment of investigator allowed, see Rule #95; motions for copy of autopsy report, Court takes no action in view of Assistant District Attorney John F. McAuliffe's promise to furnish medical examiner's report to defendants; motions for copy of defendants' statement to police—Ordered: that before trial, the District Attor-

No. of Paper	Date	
20	Jan. 8, 1964	ney exhibit, for the inspection of the defendants, any writing containing statements by the defendants to the Police.
	Jan. 8, 1964	Johnson's motion for appointment of Psychiatrist allowed on condition that Johnson complies with Rule #96 of the Superior Court. Murray, J.
		Ursula E. Nurse, official stenographer.
	Jan. 13, 1964	Oral motion for sequestration of witnesses and motion for daily copy for parties, allowed. Murray, J.
21		Certificate of protracted trial filed by Murray, J.
		Court orders jury impanelled of fourteen members.
		After impanelling of jury commenced, a juror after having been accepted and sworn, was excused from service because of illness, all parties consenting thereto, impanelling continues to completion.
		Trial as to each (with indictments Nos. 8479 to 8483 inclusive) under provisions of General Laws (Ter. Ed.) Chapter 278, Sections 33A to 33G inclusive, before Murray, J.
		Ursula E. Nurse and Mary H. Kevill, official stenographers assigned to take testimony.
22	Jan. 17, 1964	Certificate of public convenience that Court be opened on Saturday, January 18, 1964, filed.
23	Jan. 20, 1964	Johnson's request for process to summon witnesses, filed—process issued.

No. of Paper	Date	
24	Jan. 23, 1964	Johnson files motion for directed verdict.
25–26		Graves files motion for directed verdict of not guilty of murder in the first degree and motion for directed verdict of not guilty of murder in the second degree, denied as to each at close of Commonwealth's case. Murray, J.
	Jan. 24, 1964	Graves' motions for directed verdicts renewed at close of all evidence and denied. Murray, J.
		There remaining fourteen members of the jury at the time of final submission of the case, by direction of the Court, the names of two jurors were withdrawn and said jurors were discharged.
		Ursula E. Nurse and Mary H. Kevill, official stenographers.
	Jan. 25, 1964	Verdict guilty of murder in the first degree as to Johnson.
		Verdict guilty of murder in the first degree with recommendation that the death penalty not be imposed as to Graves.
		Ursula E. Nurse and Mary H. Kevill, official stenographers.
	Jan. 28, 1964	Graves sentenced to Massachusetts Correctional Institution, Walpole, for and during the term of his natural life. Murray, J.—Mittimus issued.
	Jan. 28, 1964	Johnson sentenced to suffer the punishment of death, by the passage of a current of electricity through his body, in the manner, time and place provided by law. Mittimus

No. of Paper	Date	
25–26	Jan. 28, 1964	issued. Stay of execution of sentence ordered by Murray, J. Mary H. Kevill and Ursula E. Nurse, official stenographers.
27–28	Jan. 31, 1964	Johnson and Graves each file claim of appeal. (Murray, J. and District Attorney notified.)
29	Feb. 3, 1964	Graves' motion for payment of investigation expenses, filed and allowed, in amount of $320. and ordered paid. Murray, J.
30	Feb. 5, 1964	Order that parties advise Court on or before February 25, 1964, of errors or omissions, if any, in transcript of proceedings and that Clerk be directed to withhold preparation of the record until further order of Court, filed by Murray, J. All parties notified.
	Feb. 25, 1964	Hearing on transcript of proceedings held in lobby, without stenographer. John F. McAuliffe, A.D.A., and Joseph J. Balliro, attorney for Graves, present.
31		Correspondence from Neil Colicchio, attorney for Johnson (no corrections or omissions) filed.
32		Commonwealth's proposed corrections in transcript filed. Murray, J.
33	Apr. 13, 1964	Corrections in the charge to the jury filed by Court. Murray, J.—Copies sent to Attorneys Joseph J. Balliro and Neil Colicchio and John F. McAuliffe, A.D.A.
34	Apr. 15, 1964	Correspondence from Neil Colicchio, Esquire, Re: proposed corrections in transcript and assent to action taken by the Court thereon, filed.

No. of Paper	Date	
34	May 15, 1964	Joseph J. Balliro, Attorney representing Graves and Neil Colicchio, Attorney representing Johnson, appeared before Murray, J., and each Attorney represented to the Court that corrections in the charge to the jury filed by the Court conform to fact and may be made in the transcript of proceedings. Murray, J. Francis D. McAuliffe, official stenographer.
	May 29, 1964	Letter received from Johnson discharging Neil Colicchio as his attorney and a motion for assignment of new counsel. (Murray, J. and Attorney Neil Colicchio notified.)
35	June 1, 1964	Letter received May 29, 1964, treated as notice of discharge of attorney Neil Colicchio by Johnson, and motion for assignment of counsel—ordered filed. Murray, J.
	June 16, 1964	Court (Murray, J.) assigns John M. Harrington, Jr., Esquire (Ropes & Gray, 50 Federal Street, Boston) to represent Johnson in further proceedings relating to said Johnson. All parties notified.
	June 23, 1964	Court (Murray, J.) confers with Assistant District Attorney, John F. McAuliffe and Joseph J. Balliro and John M. Harrington, Attorneys for defendants with Attorney Neil Colicchio being present, concerning corrections of the transcript of the charge of the Court. Francis D. McAuliffe, official stenographer.
36	Aug. 27, 1964	Copy of letter of Murray, J., making exhibits available for inspection by defense counsel, filed.

No. of Paper	Date	
37	Oct. 1, 1964	Affidavit of John M. Harrington, Jr., Esquire filed in accordance with Rule #95.
38		Johnson files motion for new trial. Murray, J., and District Attorney notified.
	Nov. 20, 1964	Writ of habeas corpus issued to Massachusetts Correctional Institution, Walpole, for appearance of Johnson on November 30, 1964.
	Nov. 30, 1964	Johnson brought into Court from Massachusetts Correctional Institution, Walpole, on writ of habeas corpus—hearing on motion for new trial on November 30, December 1, 2, and 7, 1964—Johnson remanded to said Massachusetts Correctional Institution at expiration of each day. Murray, J. Ursula E. Nurse, official stenographer.
	Dec. 2, 1964	Writ of habeas corpus issued to Massachusetts Correctional Institution, Walpole, for appearance of Johnson on December 7, 1964.
39	Dec. 7, 1964	Brief in support of Johnson's motion for new trial ordered filed by Murray, J.
	Dec. 15, 1964	Further hearing on Johnson's motion for new trial—continued to December 28, 1964 at 11:30 A.M. Murray, J. Ursula E. Nurse, official stenographer.
	Dec. 28, 1964	Hearing on Johnson's motion for new trial resumed and concluded. Murray, J.

No. of Paper	Date	
39	Dec. 28, 1964	Ursula E. Nurse, official stenographer.
40	July 2, 1965	Findings, rulings and order on Johnson's motion for new trial, filed. Motion denied. Murray, J. All parties notified. Copy given to John F. McAuliffe, Assistant District Attorney.
	July 6, 1965	Copies of Court's findings, rulings and order sent to Attorneys John Harrington, Jr., and Neil Colicchio.
41	July 7, 1965	Johnson files exception. Murray, J., and District Attorney notified.
42	July 16, 1965	Court (Murray, J.) files order to Clerk to prepare record on appeal.
43	July 20, 1965	Johnson files claim of appeal. District Attorney notified.
	July 22, 1965	Notice sent to Richard L. Lotreck, Ursula E. Nurse, Mary H. Kevill and Francis D. McAuliffe, official stenographers, to prepare two copies of transcript of evidence for the Supreme Judicial Court.
	July 29, 1965	Two copies of transcript delivered to Clerk by Ursula E. Nurse and Mary H. Kevill, official stenographers.
	Oct. 18, 1965	Request for designation of pleadings sent to Attorneys of Record.
	Oct. 19, 1965	John F. McAuliffe, Assistant District Attorney, makes oral designation of pleadings.
44	Oct. 22, 1965	John M. Harrington Jr., Attorney for Johnson, files designation of pleadings.

No. of Paper	Date	
44	Oct. 26, 1965	Joseph J. Balliro, Attorney for Graves, makes oral designation of pleadings.
	Oct. 29, 1965	Summary of the Record was completed and written notice of its completion sent to Attorneys for Johnson and Graves.
45–46		Clerk's certificates of notice filed.
47–48	Nov. 8, 1965	Johnson and Graves each file assignment of errors.

Law No. 13,555

COMMONWEALTH

vs.

RONALD L. JOHNSON
HERBERT GRAVES, JR.

Counsel for Plaintiff: District Attorney, John F. McAuliffe, Assistant.

Counsel for Defendant: John M. Harrington, Jr., Joseph J. Balliro.

Entered January 18, 1966
Argued December 5, 1966

Suffolk Superior Criminal

ASSIGNMENT OF ERRORS

April 4, 1967. Judgments affirmed.
Rescript April 4, 1967.
Reasons as on file.

A true copy, Attest:

Richard A. McLaughlin, Clerk of the Supreme Judicial Court for the Commonwealth.

May 18, 1967.

COMMONWEALTH

vs.

RONALD L. JOHNSON
HERBERT GRAVES, JR.

No. 8478

August 6, 1963. At the August sitting of the Superior Court an indictment charging the defendants with the crime of murder in the first degree, was returned into said Court by the Grand Jurors for said County.

A copy of the indictment follows:

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

At the Superior Court, begun and holden at the City of Boston, within and for the County of Suffolk, for the transaction of Criminal Business, on the first Monday of August, in the year of our Lord one thousand nine hundred and sixty-three.

The Jurors for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

Ronald L. Johnson and Herbert Graves, the younger of that name,

on the first day of August in the year of our Lord one thousand nine hundred and sixty-three, did assault and beat one James B. O'Leary, with intent to murder him, and by such assault and beating did kill and murder the said James B. O'Leary.

A TRUE BILL

John F. McAuliffe, Assistant District Attorney.

Ronald H. Taft, Foreman of the Grand Jury.

August 6, 1963

Returned into said Superior Court by the Grand Jurors and ordered to be filed.

Attest:

Edward V. Keating, Clerk.

No. 8479

COMMONWEALTH

vs.

RONALD L. JOHNSON
HERBERT GRAVES, JR.

August 6, 1963. At the August sitting of the Superior Court an indictment charging Johnson with the crime of robbery, armed and masked, charging Graves with the crime of robbery, armed, was returned into said Court by the Grand Jurors for said County.

A copy of the indictment follows:

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

At the Superior Court, begun and holden at the City of Boston, within and for the County of Suffolk, for the transaction of Criminal Business, on the first Monday of August, in the year of our Lord one thousand nine hundred and sixty-three.

The Jurors for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

Ronald L. Johnson and Herbert Graves, the younger of that name,

on the first day of August, in the year of our Lord one thousand nine hundred and sixty-three, being armed with a dangerous weapon, to wit: a revolver, did assault Jacob Berman, with intent to rob him, and thereby did rob and steal from the person of the said Jacob Berman money of the amount and of the value in all of nine hundred and sixty-six dollars, of the property of the Copley Wine Co., Inc., a corporation legally established and existing, the said Ronald L. Johnson being masked while committing the offence set forth above.

A True Bill

John F. McAuliffe, Assistant District Attorney.

Ronald H. Taft, Foreman of the Grand Jury.

August 6, 1963

Returned into said Superior Court by the Grand Jurors and ordered to be filed.

Attest:

Edward V. Keating, Clerk.

No. 8480

COMMONWEALTH

vs.

RONALD L. JOHNSON

August 6, 1963. At the August sitting of the Superior Court an indictment charging the defendant with the crime of unlawfully carrying on his person a revolver, was returned into said Court by the Grand Jurors for said County.

A copy of the indictment follows:

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

At the Superior Court, begun and holden at the City of Boston, within and for the County of Suffolk, for the transaction of Criminal Business, on the first Monday of August, in the year of our Lord one thousand nine hundred and sixty-three.

The Jurors for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

Ronald L. Johnson,

on the first day of August in the year of our Lord one thousand nine hundred and sixty-three, did carry on his person a certain firearm, to wit: a revolver, without having then and there any license, authority, appointment or permission, according to law, so to do.

A TRUE BILL

John F. McAuliffe, Assistant District Attorney.

Ronald H. Taft, Foreman of the Grand Jury.

August 6, 1963

Returned into said Superior Court by the Grand Jurors and ordered to be filed.

Attest:

Edward V. Keating, Clerk.

No. 8482

COMMONWEALTH

vs.

RONALD L. JOHNSON
HERBERT GRAVES, JR.

August 6, 1963. At the August sitting of the Superior Court an indictment charging the defendants with the crime of unlawfully carrying a revolver under their control in a vehicle, was returned into said Court by the Grand Jurors for said County.

A copy of the indictment follows:

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

At the Superior Court, begun and holden at the City of Boston, within and for the County of Suffolk, for the transaction of Criminal Business, on the first Monday of August, in the year of our Lord one thousand nine hundred and sixty-three.

The Jurors for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

Ronald L. Johnson and Herbert Graves, the younger of that name,

on the first day of August in the year of our Lord one thousand nine hundred and sixty-three, did unlawfully carry a certain firearm, to wit: a revolver, under their control in a certain vehicle, to wit: an automobile, without having then and there any license, authority, appointment or permission, according to law, so to do.

A True Bill

John F. McAuliffe, Assistant District Attorney.

Ronald H. Taft, Foreman of the Grand Jury.

August 6, 1963

Returned into said Superior Court by the Grand Jurors and ordered to be filed.

Attest:

Edward V. Keating, Clerk.

No. 8483

COMMONWEALTH

vs.

RONALD L. JOHNSON
HERBERT GRAVES, JR.

August 6, 1963. At the August sitting of the Superior Court an indictment charging the defendants with the crime of assault and battery by means of a dangerous weapon, was returned into said Court by the Grand Jurors for said County.

A copy of the indictment follows:

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

At the Superior Court, begun and holden at the City of Boston, within and for the County of Suffolk, for the transaction of Criminal Business, on the first Monday of August, in the year of our Lord one thousand nine hundred and sixty-three.

The Jurors for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

Ronald L. Johnson and Herbert Graves, the younger of that name,

on the first day of August in the year of our Lord one thousand nine hundred and sixty-three, did commit an assault and battery upon one Jacob Berman by means of a certain dangerous weapon, to wit: a revolver.

A TRUE BILL

John F. McAuliffe, Assistant District Attorney.

Ronald H. Taft, Foreman of the Grand Jury.

August 6, 1963

Returned into said Superior Court by the Grand Jurors and ordered to be filed.

Attest:

Edward V. Keating, Clerk.

Paper No. 4 No. 5226

REPORT TO DEPARTMENT OF MENTAL HEALTH

(On Mental Examination of Prisoner under Section 100 A, Chapter 123, General Laws)

(Tercentenary Edition)

Name Ronald Johnson (HMB) August 10, 1963

Examined at Suffolk County Jail

(AB) August 14, 1963

Indicted or Bound over for trial for the crime of Murder

1. Age 29 Religion Catholic Color Colored
2. Occupation Drives a truck
3. Single; married; divorced; widowed; separated Married
4. Birthplace Providence, Rhode Island
5. Residence 16 Devon Street, Roxbury, Mass.

   (a) How long there 3 years
   (b) " " in Massachusetts About 3 years
   (c) " " in United States Life

6. Nearest relative (state relationship) Wife Name and address Mrs. Violet Johnson, 16 Devon Street, Roxbury, Mass.
7. Attorney Mr. Colicchio
8. History of physical and mental condition Regarding his health he says "I don't know. When I bend over I get headaches." He says he fainted or passed out when in the police station. He also had blackouts when in the Marines. He was in the Marines 1953 to 1955 and received an honorable discharge.
9. Education 8th grade at age 16 years—repeated some grades.
10. Employment

    (a) History of employment He has been out of regular work for about a year but has been doing part-time work on a truck.
    (b) Earning capacity $75.00 to $80.00 a week

11. Habits:

    (a) Alcohol "A little—not too much"
    (b) Drugs Denied
    (c) Sex No sex record

12. Previous arrests, convictions and sentences Only one arrest for suspicion and never served time.
13. Social adaptability and interest in social life: A friendly fellow. He trains dogs. He enjoys fishing, likes football and basketball. He does a little reading of Adventure Stories.
14. Psychiatric findings: He answers questions in a co-operative manner. He is in good contact. When in Korea he had three or four "blackouts" with no loss of sphincter control and no biting of the tongue. He has headaches and dizziness when he bends down and gets up. He had a blackout spell in the police station. Things appear blurry to him. He has vomited a couple of times.
15. State definitely whether, in the opinion of the examiner, the prisoner is suffering from any mental disease or detect which would affect his criminal responsibility: Because of the above complaints we recommend mental hospital observation.

August 16, 1963—Filed.

/s/ Henry M. Baker M.D., /s/ Arthur Berk M.D.

No. 5226

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

L.S.

To the Keeper of the Common Jail in Boston in said County—the Sheriff of said County or his Deputies—the Officers of the Court hereinafter named—and the Medical Director of the Bridgewater State Hospital at the Massachusetts Correctional Institution, Bridgewater, in said Commonwealth.

GREETING:

WHEREAS, at the Superior Court holden at Boston within and for the County of Suffolk, for the transaction of Criminal Business, on the eleventh day of October, in the year of our Lord one thousand nine hundred and sixty-three Ronald L. Johnson now in custody of the Sheriff of our said County of Suffolk upon—an indictment—wherein he is charged with the crime of murder, in the first degree, was at—prior to—the time appointed for trial—found to the satisfaction of said Court to be in such mental condition that his commitment to an institution for the insane is necessary for his proper care or observation pending the determination of his mental condition and his removal is necessary, as provided in Section 100 of Chapter 123 of the General Laws.

These are, therefore, in the name of the Commonwealth of Massachusetts, to command you, the said Keeper—Sheriff or his Deputies—Officers of said Court—forthwith remove the said Johnson to same Bridgewater State Hospital and to deliver him to the Medical Director thereof.

And you, the said Medical Director, are hereby commanded to receive the said Johnson into said Hospital and him to detain therein for care or observation pending the determination of his mental condition, until he should be returned, not later than thirty-five days after removal to said Hospital, to the custody of said Sheriff—as provided in Section 105 of Chapter 123 of the General Laws, to be held in accordance with the terms of the process by which he was originally committed or confined, or until he is other-

wise legally returned or discharged, or committed as a mentally ill person.

And you, the said Medical Director, are further commanded to transmit to the clerk of said Court within thirty-five days from the date hereof a report as to the mental condition of said Johnson; and for so doing this shall be your sufficient warrant.

And you, said Keeper—Sheriff or his Deputies—Officers of said Court—are to make return of this warrant with your doings thereon to the Clerk of said Court as soon as may be.

Witness, G. Joseph Tauro Esquire, Chief Justice of said Court, and the seal of said Court hereto affixed, this eleventh day of October in the year of our Lord one thousand nine hundred and sixty-three.

John H. Casey,. Assistant Clerk.

Paper No. 9 No. 5226

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CORRECTION

Massachusetts Correctional Institution, Bridgewater,
Bridgewater

November 5, 1963

Edward V. Keating, Clerk
Room 712, Court House
Pemberton Square
Boston 8, Massachusetts

Dear Sir:

I am enclosing a warrant, properly signed, authorizing the return of Ronald L. Johnson, #50-8319, to Suffolk Superior Court where he is awaiting trial for murder in the first degree. He was sent to Bridgewater State Hospital for thirty-five days observation on October 11, 1963.

This twenty-nine year old married, Catholic, colored male was born in Providence, Rhode Island, and is the oldest of two children. His father died in 1941. The mother is gainfully employed and resides in Providence. She had the responsibility of the children and worked for their support. The patient married in April of 1955 and there is one child by this union.

The patient attended six grades of school in Rhode Island. He was a special class student in grades three through six, quitting school at age sixteen for employment. He transferred to the regular Marine Corps on August 25, 1953 after serving six years in reserve status and was honorably discharged on September 12, 1955. He moved to Boston in 1960.

The patient denies any juvenile or adult record. He further denies any mental or correctional incarcerations. He was treated at Boston City Hospital and Norfolk Prison Hospital for injuries sustained after his arrest.

On admission to this hospital he was surly and somewhat suspicious but very soon became cooperative, has remained in good contact, is oriented and evidences no symptoms of an overt psychosis or memory defect.

An E.E.G. performed here was abnormal but consistent with recent brain surgery.

Psychometric tests reveal a Full Scale I.Q. of 86.

It is the opinion of the staff that he is competent to stand trial and ably assist his counsel in his own defense. His return to court is therefore recommended.

Diagnosis: No major psychiatric disease.

Very truly yours, /s/ Samuel Allen, M.D., Acting Director of Clinical Psychiatry.

SA/mf
Enc.
Nov. 12, 1963—Filed

[Tr. 194] JACOB B. BERMAN

Direct examination.

By Mr. McAuliffe:

* * * * *

Q. Were you working there in the vicinity of 9.00 o'clock?

A. I was, sir.

Q. And directing your attention to the vicinity of 9.00 o'clock, did something happen?

A. Yes, sir.

Q. Tell His Honor and the jury, please, just what happened.

[Tr. 195] A. Well, a gentleman came in and asked me for three cans of beer. I walked to the back of the store and the ones that he wanted I couldn't reach through the front of the refrigerator, so I went to the back, the side of the refrigerator that has a door. I got the six package, the package with six cans in it. I removed three, left them on the little counter like. Then I took the other three and put them into the refrigerator and closed the door. With that I felt a gun enter my side.

* * * * *

[Tr. 197] Q. Now, can you describe this man?

A. Well, he was about five foot nine, weighed about a hundred and ninety-five, I would say. He had a blue bandanna handkerchief with small designs in it across his face.

[Tr. 198] He had on a dark raincoat and a white hat, white cap.

Q. And, Mr. Berman, I'll ask you this question at this time. Did you later chase that man that you have just described?

A. I did.

* * * * *

[Tr. 199] Q. How was the man dressed?

A. Well, he had on a dark, what appeared like a raincoat, a white hat and a blue bandanna handkerchief across his face.

Q. And did you notice the shirt he was wearing, if any?

A. When he leaned over to pick up the money that had [Tr. 200] fallen to the floor I could see between the bandanna handkerchief and the collar of the coat a brown shirt.

Q. I show you this, sir, and ask you whether or not you recognize it?

A. Yes, sir. The dark coat the gentleman was wearing.

Q. Was he wearing this when he was in the store and held you up?

A. Yes, sir.

Q. And you have testified you later chased him?

A. I did.

Q. Was he also wearing the coat when you chased him?

A. He was.

Mr. McAuliffe: All right. At this time may this be marked for identification?

The Court: It may. "A" for identification.

(Received and marked "A" for identification.)

Q. Now I show you this, sir, and ask you whether you recognize this?

A. Yes, sir. This is the striping that I saw between the bandanna and the raincoat.

Q. That is the striping of the shirt you saw in the area you have described, is that right, sir.

A. That is right, sir.

• • • • •

[Tr. 214] Q. Now you have told us that you followed this man, at least you had him in your sight until he got up to Fairfield Street?

A. Yes, sir.

Q. And at some time did he get out of your sight?

A. Not—only when I was at the corner of Boylston, to the time he was at the alleyway, between Boylston and Newbury, and then again only from the time that he made the turn on the left-hand side of Newbury toward about this second building on the left.

Q. I see. Whether or not he was still on the left side of Newbury Street when you picked him up again?

A. That is right.

Q. And then you testified that he crossed the street diagonally, went up to Fairfield Street?

A. On the right-hand side of Newbury and to Fairfield.

Q. On Fairfield Street, what direction did he go?

A. He turned right, toward Commonwealth.

Q. Now, Mr. Berman, this man that you say, when you looked out the window, you saw at the fire equipment store, and then left your store and followed him down Boylston Street, down Exeter Street, up Newbury Street, and lost sight of him on Fairfield Street, is that right, when he [Tr. 215] turned right?

A. After he made the turn onto Fairfield Street.

Q. Is that the man that held you up?

A. Yes, sir.

Q. All right, sir. After seeing him go down Fairfield Street, what did you do?

A. I continued to run across Newbury and down Fairfield.

Q. Where did you go?

A. Down Fairfield.

Q. How far?

A. To the corner of Commonwealth to the mall.

Q. While you were on Exeter Street, on Newbury Street, did you see a police officer?

A. I did.

Q. Where was the police officer when you first saw him?

A. He was getting into a car.

Q. Where?

A. On Newbury Street, about halfway in the block.

Q. How was the police officer dressed?

A. He was just in a white shirt and a cap, police officer's hat.

Q. Did you see where that automobile went that he got into?

A. It went right along Newbury Street.

[Tr. 216] Q. And where else?

A. Then it turned down Fairfield.

Q. And where was the police officer when you last saw him?

A. Getting into the automobile.

Q. You mean on Newbury Street?

A. On Newbury Street.

Q. You didn't see him after that?
A. After that, no, sir.

[Tr. 264] ROBERT GANNON.

Cross-examination.

By Mr. Balliro:

Q. Do you recall what time it was that you were asked to view this line-up?
A. The exact time I don't know. It was in the morning, early in the morning.
Q. Help us as best you can with respect to the hour that you recollect?
A. About two o'clock, I would say.
Q. And how many times were you asked to look at a line-up?
A. Once.
Q. Did you remain at the police station or at headquaters after you viewed the people in the line-up?
A. I sat there until we were let go.
Q. At this line-up, Mr. Gannon, how many men were in the line-up?
A. About 12, 13.
Q. And were they all colored men?
A. No.
[Tr. 265] How many of them were white men?
A. I couldn't say right off.
Q. Would you say that half of them were white men?
A. Half?
Q. Yes.
A. Truthfully, I couldn't say. I don't know.
Q. Well, when you saw the man on the sidewalk outside of the liquor store, did you know that that man was a colored man?
A. Yes, sir.
Q. So that with respect to the people that you saw in the line-up, you knew none of the white men in the line-up was the man that you saw outside the liquor store?

A. That is correct.
Q. You immediately threw them out, isn't that correct?
A. Yes.
Q. Hadn't you told the police before they asked you to view the line-up, that the man was a colored man?
A. Had I told the police that?
Q. Yes.
A. Yes.

• • • • •

[Tr. 270] Cross-examination.

By Mr. Colicchio:

• • • • •

Q. You say that Mr. Johnson had the same type build as the man that was in the liquor store?
A. Yes, sir.
Q. Was there anyone else in the lineup that had the same type build?
A. Not to my knowledge, no.
Q. There wasn't. How heavy would you say Mr. Johnson is?

The Court. Now?

A. Now or then?
Q. Then.
A. Then. I picked him about 185, 190 pounds.
Q. How tall?
A. About 5, 9.
Q. And he was the only man in the lineup that was about 5, 9 weighing about 185 pounds?

Mr. McAuliffe. Or 190.

Q. All right, 185, 190?
A. There might have been some there, but he was the man that struck me as his size.

• • • • •

[Tr. 272] Q. This was about what time?
A. To the best of my knowledge about 2.00 o'clock in the morning.

[Tr. 273] Q. Did you observe any blood on Mr. Johnson's face at that time?

A. No, I didn't see any.

Q. Did you observe any blood on Mr. Johnson's head at that time?

A. No, not on his head, no.

* * * * * *

Cross-examination.

By Mr. Balliro: (cont.)

Q. You say that Mr. Johnson at the lineup had a shirt on?

A. Yes, sir.

Q. A multi-colored shirt?

A. Yes, sir.

Q. Did you notice any blood on that shirt?

A. There were some stains on it.

Q. And in what portion of the shirt were there stains?

A. There were some stains on it.

Q. What portion were there stains?

A. I don't know, just down the front.

[Tr. 288] William Edward Thomas.

Direct examination.

By Mr. McAuliffe:

* * * * * *

Q. Well, after hearing these women screaming what, if anything, did you see?

A. Well, I saw a man run around the corner of Exeter Street and Boylston, around the same side the drugstore is on, and about two seconds after he ran, another fellow ran around the corner.

Q. Do you know the other fellow that was running after him?

A. Yes. I have seen him in the package store there.

Q. Which package store are you talking about?

A. The Lenox, I think it is.

Q. How was the man dressed that you saw running after the man that you saw run around the corner?

A. Well, it was pretty dark. The only thing I could tell he had a sort of green plaid shirt on.

Q. Which man is this?

A. This is the first fellow I seen running.

Q. Was that man white or colored?

A. He was colored.

Q. And I show you this, sir, Exhibit 7, and ask you if you recognize it?

A. That is the shirt.

[Tr. 289] Q. That is the shirt that the colored man was wearing?

A. Yes.

Q. Did he also have on a coat?

A. He had a coat on, but I couldn't describe it. It was dark, I know. That is the only thing.

Q. And was the drugstore open?

A. Yes, it was.

Q. And any lights in the drugstore?

A. Yes, there were.

Q. Now, the man that was—you saw a man two seconds later coming after the man that was wearing that shirt?

A. Yes.

Q. How was he dressed?

A. He had dark trousers on and a white shirt and necktie.

Q. And that is the man you recognized as being at the liquor store?

A. Yes.

Q. Was he saying anything or doing anything?

A. I heard him say, "Stop him. Stop him." That is the only thing he said.

Q. And what time was this, about?

A. This was somewhere, I think, 9.00 o'clock and a little after.

Q. Do you see the man in the courtroom that you saw [Tr. 290] wearing this shirt?

A. I couldn't identify him. I couldn't see his face.

Q. You couldn't see his face?

A. No.

Q. Did you have an opportunity to see his build?

A. Yes. He was sort of stocky, around a hundred and eighty, eighty-five pounds.

* * * * *

[Tr. 353] MARY ANN TAYLOR.

Direct examination.

By Mr. McAuliffe:

* * * * *

Q. Do you know Jacob Berman, the clerk at the Copley Wine and Liquor store?

A. I do.

Q. I direct your attention, Mrs. Taylor, to the night of August 1. Did you see him?

A. Yes, I did.

Q. Where was he when you first saw him?

A. I saw him on Newbury Street.

Q. What was he doing?

[Tr. 354] A. He was pursuing a man.

Q. And describe the man he was pursuing?

A. He was a tall, heavy-set Negro fellow, wearing a dark coat. And I think he had something white near his neck.

* * * * *

[Tr. 355] Q. And Mr. Berman, did he say something, yes or no?

A. Yes.

Q. As a result of anything he said, what did you do?

A. I chased this man.

Q. And tell us how far you chased him?

A. Well, I chased him up to the, about the point of Exeter and Fairfield.

Q. Yes.

A. And then I crossed on over to Commonwealth Avenue.

Q. And you crossed on over to Commonwealth Avenue?

A. Yes.

The Court: Let me interrupt you.

Mr. McAuliffe: Excuse me, Your Honor.

The Court: I think you said the corner of Exeter and Fairfield?

The Witness: Well, I was running all the time. I turned right on Fairfield to get to Commonwealth Avenue.

Q. You turned right on Fairfield?

A. That's right.

[Tr. 356] Q. To Commonwealth Avenue?

A. That's right.

Q. And could you see the man that was being chased, that you saw being chased by Mr. Berman, when you got on Fairfield Street?

A. No. I lost sight of him there because the cars came by and I couldn't cross over.

Q. Did you continue along Fairfield Street?

A. Yes, I did.

Q. Where did you go to?

A. Well, I had to wait as I said. There were lights and cars going by. And then I crossed on to the mall.

Q. Where you waited was at the corner of Commonwealth Avenue and Fairfield Street, at the lights, is that right?

A. That's right.

Q. And then you crossed on to the mall?

A. That's right.

Q. And did you see the colored man that Mr. Berman was chasing at that time as—did you see where he was?

A. Yes.

Q. Where was he?

A. He was at the back of a car, standing at the back, trying to get in the back of the car.

[Tr. 357] Q. And where was the car?

A. The car was parked on the opposite side of Commonwealth Avenue, going towards Mass. Avenue, Mass. Avenue direction. It would be going up that way.

Q. In other words, it would be the outbound lane?

A. That's right.

Q. And what part of the car was this man that you say you saw Mr. Berman chasing then?

A. He would be at the end of the car, the back part.

Q. The end ——

A. The back part of the car.

Q. Having in mind the front of the car, was he at the left side or the front side?

A. He would be in the back of the driver's seat, the back seat, the back door.

Q. Was he in the car?

A. No. He was trying to get in.

Q. Trying to get in from the driver's side or the passenger side?

A. The driver's side.

Q. How was this man dressed, other than what you described?

A. All I can remember is that he had a dark coat on. It hit him around the knees or above the knees. I am not quite sure. And it seems to me that he had something [Tr. 358] white near his neck.

Q. Now, did you see a police officer?

A. Yes, I did.

Q. And where were you and where was the police officer when you first saw him?

A. The first time I saw the police officer was when he was behind me. He was in pursuit behind me.

Q. Tell us what you saw the officer did, do, rather?

A. The officer was running behind me and finally he caught up with me and we were neck and neck. And he raced on ahead and then just about—I would say it was near 222 Newbury Street, there was a car parked there with a lady and a man inside. And this man offered his car to the patrolman and the policeman got inside his car and then they went on ahead and turned right on Fairfield Street. And I think they went on to Commonwealth Avenue. And the policeman got out of the car chased this man.

Q. Where did you see the policeman get out of the car?

A. I didn't see him after he got out of the car but I saw the ——

Q. When next did you see the policeman?

A. At the back of the car with the man.

Q. At the back of the car?

A. Yes.

[Tr. 359] Q. And what was he doing?

A. I heard him say something, "Don't get in the car," or something to that extent. And the next, ——

Q. Where was the man that you chased along with Mr. Berman at that time?

A. At that time is when I heard the shot and then the next thing I knew the officer was lying dead on the floor.

• • • • •

[Tr. 360] Q. Did you see the car?

A. Yes.

Q. That you saw Officer O'Leary at and this man that was being chased after move?

A. Yes.

Q. Where did it go?

A. It went on straight ahead.

Q. Towards where?

A. Towards Mass. Avenue, I think. I am not sure. I just saw it move away.

Q. Well, when you saw it move was it moving in the direction of Mass. Avenue?

A. Yes.

• • • • •

[Tr. 363] Q. Now, do you see the man in the courtroom that was being chased by Mr. Berman and Officer O'Leary and you?

A. I am not sure, but I think it is the gentleman ——

Mr. Colicchio: I pray Your Honor's judgment.

Q. Do you see any man in the courtroom that looks like the man?

A. Yes, I do.

Q. Will you point him out, please?

A. I think it's that fellow.

Mr. McAuliffe: May the record show that the witness is pointing ——

The Court: Will you point again?

Now, will you describe where you see the man now, the man you pointed out. Where is he now? You just pointed out a man. Where is he?

[Tr. 364] The Witness. He is sitting in that box.

The Court: In that enclosure?

The Witness: That enclosure.

Mr. McAuliffe: May the record show the witness is pointing to the defendant Johnson?

* * * * *

[Tr. 369] Cross-examination.

By Mr. Colicchio:

* * * * *

Q. Sometime later that evening, you appeared at a lineup?

A. That's right.

Q. At Headquarters? A. That's right.

[Tr. 370] Q. What time was it you appeared at the lineup?

A. I don't know. It seemed like I was there forever. It might have been three or four in the morning, I am not sure.

Q. Three or four in the morning?

A. I don't know. From the moment that the officer was killed I was ——

Q. In any event, ——

A. It was late.

Q. Pretty early in the morning?

A. Yes.

Q. The last question asked of you by the District Attorney was at the lineup did you see the man that you had chased? Was your answer to that Yes?

A. I couldn't definitely swear on it. I think it was the man.

Q. So you think it was? A. Yes, that's right.

Q. You cannot say?

A. No, I have that one shade of doubt. I think it was him.

Q. When you appeared at the lineup, how man men did they have in the lineup?

A. There were several.

Q. Several? A. Several.

Q. Can you tell us approximately how many this several is?

A. Maybe six, I am not quite sure.

[Tr. 371] Q. Were they all colored fellows?
A. I don't remember. At least four were.
Q. At least four were. Do you remember if there were any white fellows in the lineup?
A. I think there were.
Q. Prior to viewing the lineup, had you informed the police that the man you chased was a colored man?
A. Yes, I had.
Q. At the lineup did you see the defendant Ronald Johnson?
A. Yes, I did.
Q. What was Mr. Johnson wearing at the lineup?
A. He was wearing a shirt, I don't recall the color; he had tattered pants on, and he was bleeding on the head, and he was scraped and everything all over his body.
Q. Did someone put a black coat on him, or a dark colored topcoat on him?
A. No, I don't remember that.
Q. You don't remember that?
A. No.
Q. You say he was bleeding?
A. I think at the knee, too.
Q. At the knee?
A. I think so. His pants were torn, as I recall. I think it was on his right knee.
Q. His right knee you saw blood?
A. Yes.
Q. Did you observe blood on his face?
A. I am not sure but I don't think so.
[Tr. 372] Q. Did you observe any blood on his head?
A. Yes, I did.
Q. On what area of the head did you observe the blood?
A. I would say—May I point?
Q. Yes.
A. I would say right about, I think, here [indicating].
Q. You are pointing toward the——
A. Right here.
Q. Your right——
A. Cranial.
Q. Right rear of your head?
A. Right side.

Q. Was the blood flowing from the head at the time?
A. I think it was, I am not sure.

• • • • •

[Tr. 379] Cross-examination.

By Mr. Balliro:

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Q. So that it is fair to say it was closer to four o'clock that you saw the lineup?
A. I would, probably.

• • • • •

[Tr. 387] MAURICE JOYCE CURRAN, III.

Direct examination.

By Mr. McAuliffe:

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Q. What time was your attention attracted to something?
A. I would say that it was about a minute or two after nine o'clock, because I just heard nine o'clock strike.

• • • • •

[Tr. 388] Q. Well, is it fair to say you were on the corner of Exeter and Newbury Street?
A. Right.
Q. The corner nearest Boylston Street?
A. Right.
Q. And Massachusetts Avenue?
A. Right.
Q. What was it, sir, that attracted your attention?
A. I heard some shouting up the street. This is up Exeter or down Exeter towards Boylston.
Q. Yes?
A. And then I saw a young man come running down the, running down the street towards where I was, in other words.

Q. Can you describe the man?

A. He was a well-knit, well-built fellow of, I don't know, five ten, something like that, I suppose, and a good strong face.

Q. What?

A. A good strong face.

Q. Yes?

A. And he had some kind of white headgear on. I don't know what that was. He had a raincoat of some kind of rayon material, I would think, and dark trousers. Other [Tr. 389] than that, I would not be able to describe him any more detailed, I don't think, than that.

* * * * *

[Tr. 390] Q. Do you see anyone in the courtroom that looks like the man that you described?

A. Yes, I can say that I see a man that strongly resembles——

Q. And where is that man?

A. He is over there to the right in the dock, if that is the term.

Mr. McAuliffe: And may the record show that the witness is pointing to the defendant, Johnson?

* * * * *

[Tr. 393] The Witness: This goes back to the original corner we are talking about.

Q. Exeter and Newbury?

A. Right.

Q. Tell us about this other man you saw after?

A. Well, he was a man of middling years I would say.

Q. Have you seen him since?

A. Yes, I have.

Q. Do you know who he is now?

A. Yes, I do.

Q. Who was he?

A. He is the proprietor of the liquor store.

Q. What was he doing when you saw him?

A. He was running when I saw him.

Q. And running in what direction, sir?

A. He was coming—he was going north on Exeter Street.

Q. Going towards Commonwealth Avenue?

A. He was running exactly the way this first gentleman had been running; in other words, he was coming down, coming from Boylston Street along Exeter and he was turning the corner.

Q. What corner?

A. Newbury Street—Exeter and Newbury Street.

Q. And where was the man you pointed out there at the [Tr. 394] time you saw this proprietor of the liquor store?

A. This is a guess: I would say he was perhaps 20 yards along west on Newbury Street.

Q. And was he walking or what, that man?

A. I'm sorry, the first man or the second man?

Q. The first man.

A. He was running, still running.

Q. How about the second man?

A. He was running too, but he stopped when he got to me.

Q. The second man, that is the proprietor of the liquor store, stopped when he got to you?

A. Right, yes.

Q. Now, did you follow after the colored man that was running?

A. Yes, I did.

Q. —that you pointed out here?

A. Yes.

Q. Did you see a police officer at sometime?

A. Yes, I did.

Q. Where was the police officer when you first saw him?

A. He was at an automobile going the wrong way on Fairfield Street. In other words——

Q. He was in an automobile?

A. Right.

[Tr. 395] Q. Anyone else in the car besides him?

A. Yes. There was a man and woman and the officer was in the rear seat of the car sitting in the middle of the seat.

Q. And where were you at the time?

A. I was on Fairfield Street headed north.

The Court: Fairfield and where, I didn't hear your answer.

The Witness: I was on Fairfield Street running north,

this would have been, just about between Newbury and Commonwealth on Fairfield just about dead center.

Q. You were running?

A. Yes.

Q. And did you continue to run?

A. Not when—I ran to the corner.

Q. Of what?

A. Of Commonwealth and Fairfield and the police officer went through the light there with these people, and I stopped to wait for the light to change.

Q. Now, when the car the police officer was in went through the light, did it turn—did it make a turn?

A. It went straight through. In other words, it crossed over the inbound lane into Boston.

* * * * *

[Tr. 407] Cross-examination.

By Mr. Colicchio:

* * * * *

Q. At some time did you have occasion to view a line-up?

A. I am sorry—police headquarters, I am wrong. I went to Station 16. I went to police headquarters at three o'clock in the morning, I think, was when I went to police headquarters.

Q. 3 A.M., August 2nd?

A. Yes.

Q. At that time did you have occasion to view a line-up?

A. Yes, I did.

Q. Can you tell me who was present at the line-up besides yourself, excluding persons standing on the stage that you viewed?

A. There was an amphitheatre, or some kind of—there were a number of people to the read of me. I couldn't really say how many, but there were other people in the room. Then there was a gentleman that was conducting the line-up, and there were other——

Q. At that time, did you have occasion to view the defendant Ronald Johnson?

A. Yes, I did.

[Tr. 408] Q. And can you tell me how many people were in the line-up at that time?

A. Around seven to ten.

Q. Seven to ten?

A. Yes. That's an estimate, a guess.

Q. Were they all colored men?

A. No, as I recall, they weren't.

Q. Can you tell me how many of the people in the line-up were colored men?

A. The majority. Again, this is perhaps more guesswork, but I wouldn't say perhaps all but two, two or three. I couldn't really—I perhaps should not answer that question. All I can say is the majority were colored men.

Q. Did Mr. Johnson have a coat on at that time?

A. No, he did not. When I saw him, he did not have a—oh, wait. He had an a shirt, I remember he had a striped shirt, he had green trousers, and I don't know whether he had on a coat or not, but he had a striped shirt, I think, and green trousers.

Q. Did you observe the condition of the trousers?

A. Yes, I did.

Q. At that time?

[Tr. 409] Yes, I did. They were badly torn, as I recall. The right trouser leg was badly torn.

Q. Did you observe his right leg at that time?

A. If I did, I don't remember anything untoward. I don't remember anything unusual about it except remarking the condition of the trouser leg. I don't remember the leg itself as being——

Q. Did you observe whether or not there was any blood on his face at that time?

A. Yes, there was.

Q. Can you tell me in what area of the face you observed the blood?

A. Again, this is not certain. I seem to think it was on the right side of his face.

Q. Did you observe any blood on his head?

A. Possibly on the right side of the forehead. I am not sure whether right or left, but I seem to recall blood on the side of his face up around his forehead——

Q. Do you recall——

A. —to the right.

Q. —whether or not the blood was flowing at that time?

A. I don't recall it being clotted, anyway. I won't say [Tr. 410] it was flowing, but it seemed to be a fresh, as I recall, it seemed to be reasonably fresh. I can't actually say whether it was flowing or not. I guess I should say that, I can't really say whether it was flowing or not.

Q. When you came into the amphitheatre, was Mr. Johnson already on the stage?

A. Yes.

Q. Did you observe him being onto the stage?

A. No. Perhaps I should say this——

Q. No, no, excuse me.

The Court. Do you want to change your last answer in response to that question?

The Witness. Yes, I do.

The Court. Let it stay there. The witness indicates a desire to change his last answer.

Q. I believe the question last put to you was whether or not you observed Mr. Johnson being brought onto the stage?

A. Not when I was if I can answer it this way, not when I was in the amphitheatre.

Q. But you did observe him being brought onto the stage?

A. Tell me if I am out of order here——

The Court. No, no. Just answer the question.

[Tr. 411] Did you observe him being brought onto the stage?

A. As such?

Q. Yes.

A. No.

Q. Did you observe him being brought into the amphitheatre?

A. Yes, I did. I should say I think it was he, I think it was he being brought in that I saw.

Q. Well, did you see him being brought in by police officers?

A. Yes.

Q. Was he brought in by one or more?

A. I would say more.

Q. And this was about what time?

A. By that time, it was well after three o'clock, I would think, by that time.

Q. Can you describe the manner in which he was brought in by the police officers?

A. I think they, if this is Mr. Johnson, whom I think it was that I saw, they were in perhaps a hurry to get him into the amphitheatre.

Q. What do you mean by in a hurry? Can you describe their actions? Were they pushing him in?

A. They were—they were, yes, I would say, not violently, [Tr. 412] not violently, but they were—I don't think pushing would be a wrong word to use, no.

Mr. Colicchio. I have nothing further.

Redirect examination.

Q. [By Mr. McAuliffe] Did you observe any bandage or band-aid on Johnson at the line-up, Mr. Curran?

A. When I was at the line-up, did I observe any bandage?

Q. Bandage or band-aid on Mr. Johnson?

A. Not that I recall now.

Q. Well, now, were other men brought into the amphitheatre while you were there at the line-up?

A. No, this is the only man that I saw that was—I was not in the line-up, you understand, at this time.

Q. Where was this that you saw——

A. In the corridor outside the amphitheatre, and I say that I think that this was Mr. Johnson, but I would not be certain that it was he who was being brought in to the amphitheatre.

Q. Well, now, you did go in a place where you were asked to view a group of men, is that right?

[Tr. 413] A. Yes.

Q. And did you pick any one out of that group?

A. Yes, I did.

Q. As the man you saw just previously the night before, August 1st?

A. Yes.

Q. Who did you pick out?

A. I said that Mr. Johnson, and these I know are my exact words, I said, "Strongly resembles the man that I

chased earlier in the evening," but I used the words "strongly resembles."

Q. What do you say now?

A. I say the same thing. I would say exactly the same thing.

Mr. McAuliffe. No further questions from me.

Cross-examination.

Q. [By Mr. Balliro] Mr. Curran, did you say that there were about ten men in that line-up?

A. At a guess. I said I think from seven to ten. That's a guess.

Q. As I understand your testimony, you saw a man whom you believe to be the defendant Johnson being pushed and hurried into the amphitheatre?

A. When I say being pushed, there was some kind of [Tr. 414] commotion. Now, whether there was resistance on Mr. Johnson's part or whether it was just pushing or not, I couldn't say.

Q. You don't know anything about any resistance on Mr. Johnson's part?

A. No, I don't know one way or another, except I should perhaps say in better terms than pushing, perhaps there was some commotion.

Q. I see.

A. That I cannot define as to cause and effect of why this is so, if that is——

Q. Were you in the amphitheatre at that time?

A. No, I was not.

Q. It was before you entered the amphitheatre?

A. Yes.

Q. It was before you were asked to make any identification?

A. That is true.

Q. Did you see the other men that later turned out to be in the line-up being taken into that room?

A. No, I only saw this one man.

Q. You didn't see any commotion around the other men that were in the line-up?

A. I only saw one man being brought into the amphitheatre.

Q. That was the man you were being asked to identify? [Tr. 415] A. I say that I think he was.

Q. Is it a fair statement, Mr. Curran, to say that certainly your attention was directed——

A. Certainly.

Q. —at Johnson as a result of the manner in which he was taken into the amphitheatre?

A. It was directed when I saw this commotion, it was directed, yes.

Mr. Balliro. That is all.

Mr. Colicchio. I have no other questions.

Redirect examination

Q. [By Mr. McAuliffe] Did that influence you in any way in looking at the line-up?

A. I do not think that it did influence me in any way when I was looking at the line-up, because I was somewhat up the hallway from, as I recall—the amphitheatre is at the end of a hallway, and I was somewhat up the hallway, so I couldn't clearly see this man, and I said that Mr. Johnson strongly resembled the man that I chased, and I based it on the man that I chased and not on the man, on the glimpse of this commotion that [Tr. 416] I saw at the end of the corridor.

* * * * *

[Tr. 417] PAUL MASSE.

Direct examination.

By Mr. McAuliffe:

* * * * * * *

Q. While on Newbury Street with your friend, did something attract your attention?

A. Yes.

Q. What was it?

A. People running down the street.

Q. Yes, and what did you see in connection with the people running down the street?

A. Well, I saw one man running down the street and there were a couple of people running behind him.

Q. The man you saw running down and the couple of men running behind him—take the first man. Did you notice his color?

A. Pardon?

Q. Did you notice what color he was?

A. Yes.

[Tr. 418] Q. What?

A. Black.

Q. How was he dressed?

A. He had a trenchcoat on, a dark trenchcoat, and some sort of a hat of very light color.

Q. Pardon?

A. A hat of very light color.

Q. Yes. Anything else you noticed about him?

A. That is all I noticed, his clothing.

Q. Did you notice whether or not he was carrying anything?

A. Yes.

Q. What?

A. He was carrying a paper bag underneath his arm.

Q. Will you stand up, please, and show the jury in what manner he was carrying a paper bag under his arm?

A. [Indicating.] Like such.

Q. And what type of bag was it?

A. I would say it was a regular grocery bag, brown.

Q. And did you hear the man you saw carrying the paper bag say anything?

A. Yes.

Q. With reference to people that were chasing him?

A. Yes.

[Tr. 419] Q. What did he say?

A. As he went by me, he yelled something in a manner of "Stop these people, they are after me," or something of that manner.

* * * * *

Q. Where did he run to?

A. He ran down the end of the street to Fairfield Street.

Q. Yes?

A. And, of course, by that time the other people had [Tr. 420] gone by me, also.

Q. Yes?

A. And I turned around and watched, and he made a turn at the Fairfield turnoff, down towards Commonwealth, and at the time the other people just stood at the end of Fairfield Street, Newbury and Fairfield. They stood there and watched, and then they went down towards Fairfield, towards Commonwealth.

Q. They went down Fairfield Street toward Commonwealth?

A. Right.

Q. Those were the people chasing him?

A. True.

Q. How many?

A. There were three at the time, police officer, and two other gentlemen, and——

• • • • • •

[Tr. 422] Q. Do you see the man in the court room that you saw that night carrying the paper bag and that said what you heard said there?

A. Yes, I do.

Q. Where is he?

A. Sitting directly over there to my right.

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[Tr. 429] Cross-examination.

By Mr. Colicchio:

• • • • • • •

Q. Can you give me the best estimate as to the time that you went down to headquarters to view the lineup?

A. I'd say probably 12.00-12.30. That is the closest estimate I can make.

Q. Well, your best estimate is between, somewhere around 12.00 midnight and 12.30 a.m. on August 2, correct?

A. Yes.

Q. And did you view the lineup in the amphitheatre?

A. Pardon?

Q. Did you view this line up in this amphitheatre? Did [Tr. 430] they have a stage?

A. Yes, I did.

Q. Prior to going into the area where the stage was, were you out in the corridor?

A. Yes, I was, for a short period of time.

Q. A short period of time?

A. Yes.

Q. Did you observe the defendant Ronald Johnson being brought into the area where the stage was?

A. I can't recall seeing him, no.

Q. When you went into the lineup were their men already on the stage?

A. Yes, there were.

Q. How many men were on the stage?

A. Nine, I believe.

Q. And were there some white men in the lineup?

A. One.

Q. One white man, eight colored fellows?

A. I believe so, yes.

Q. Mr. Johnson was in the lineup?

A. Yes, he was.

Q. Did he have the black coat on?

A. No, he didn't.

Q. He did not?

A. No.

[Tr. 431] Q. What was he wearing?

A. He had a sort of a plaid shirt, and green pants. I guess they were green, I think.

Q. What was the condition of the pants that he was wearing?

A. They were shredded, torn.

Q. Pardon?

A. They were shredded and torn.

Q. Did you see his right leg?

A. I don't remember looking at it.

Q. Did you observe whether or not there was any blood in his face?

A. Yes, I did.

Q. And was there?

A. Yes.

Q. Where was it??

A. It was in the facial area of the nose and mouth, I believe. I did notice there was blood on his face.

Q. Did you observe whether or not there was any swelling to any portion of the face.

A. Yes. The cheek part here was swollen.

Q. Did you observe whether or not there was any bleeding of his head?

A. No, I didn't.

Q. Did you observe the defendant Johnson's head?

[Tr. 432] A. Well, no. All I could see was the front part.

Q. Did they ask him to turn around for you?

A. I think they did, yes, but I don't recall seeing any blood or anything.

Q. Before going into the lineup did you talk on some police officers?

A. Yes.

Q. And you were aware that you were going to view the lineup to identify somebody?

A. That is what I was told, yes.

Q. And you were told you were doing to identify a colored man?

A. Pardon?

Q. You were told you were going to identify a colored man?

A. No, I wasn't told that. I was just told I was going to pick out who I had seen in the lineup.

Q. Had you given a description to the police prior to going to the lineup?

A. Yes, I had.

Q. And when was the first time you gave this description?

A. When I was at the 16th Precinct.

Q. To whom did you give it?

A. Detective Shrayfield?

[Tr. 433] Q. Schofield?

A. Schofield.

Q. The officer sitting at the table with the District Attorney?

A. Yes.

Q. And did he write this description down on a piece of paper?

A. Yes, he did.

Q. And you observed it?

A. Yes.

Q. Out of the nine men in the lineup did you notice blood on any of the others, other than Mr. Johnson?

A. No, I didn't.

Q. You did not. Incidentally, what was the condition of Mr. Johnson's shirt when he was standing up on the stage?

A. It, too, was torn.

Q. So that, his trousers were torn, his shirt was torn, and you saw blood on him?

A. Yes.

Q. Was the shirt of any other man on the stage torn?

A. No, I don't believe so.

Q. Were the trousers of any of the other men on the stage torn?

A. No.

[Tr. 434] Q. So that as you looked up at that stage there was only one man among the nine that was bleeding and had on torn shirt and torn trousers?

A. Yes.

Q. Is that right?

A. Yes.

Q. And he is the man that you picked out?

A. Yes.

Mr. Colicchio: I have nothing further.

Redirect examination.

By Mr. McAuliffe:

Q. How close were you to the man that you picked out when he passed you on Newbury Street, Mr. Masse?

A. I'd say he was about two to three feet.

[Tr. 440] JOSEPH T. TRELEGAN.

Direct examination.

By Mr. McAuliffe:

Q. And after she got out of the car did somebody else get in the automobile with you?

A. Officer O'Leary.

Q. Now, previous to Officer O'Leary getting into your automobile, was your attention attracted to anything?

A. I saw a man running ahead of Officer O'Leary and the people there, a few people were hollering, "Stop him. Stop him."

Q. And the man that was running ahead of Officer O'Leary, can you describe him?

A. He was a big man, wearing a dark coat; and his head was covered. I couldn't see his face.

Q. What was on his head?

A. Well, it might have been a scarf or a white hat or something covering his head.

Q. Was he white or colored?

[Tr. 441] A. Well, I couldn't say.

Q. Now, Officer O'Leary got in the car with you?

A. Yes, sir.

Q. And after he got in, where did he sit in the car, by the way?

A. He got into the back, in the back seat.

Q. After he got into the car, where did you go with him?

A. To follow the man.

Q. Where?

A. We took the first right, Fairfield, I think.

Q. Then what?

A. We were following the man.

Q. Yes.

A. Till we got to Commonwealth Avenue and then we took the right on Commonwealth Avenue. And he told me to stop the car, which I did. And the man was running across Commonwealth Avenue to the other side. And Officer O'Leary gave chase and a few minutes later I heard two shots go.

Q. Now, the man that was running across Commonwealth Avenue, is that the same man you saw first, that Officer O'Leary was chasing?

A. Yes, sir.

Q. And you say he ran across Commonwealth Avenue to where?

[Tr. 442] A. To the other side of Commonwealth Avenue.

Q. And did you hear him say anything?

A. Officer O'Leary?

Q. No, the man that Officer O'Leary was chasing?

A. I never heard the man's voice.

Q. Did you see an automobile on the other side?

A. Yes, sir.

Q. And where?

A. It was coming up on the other side. And when the Officer and the man he was chasing got near the other side the car turned over as if it was going to meet the man the officer was chasing.

Q. And this car was on the outbound lane of Commonwealth Avenue, is that right?

A. Yes, sir.

Q. And you say that it turned over to the man that was being chased?

A. Headed over that way. I could see by the lights of course. It was at night and I just followed the lights of the car.

Q. Well, at any time did you hear the man being chased say anything to anybody in that automobile that turned over towards him?

A. No, sir. I heard Officer O'Leary.

[Tr. 443] Q. All right, O. K. At some time you heard Officer O'Leary say something to someone in that automobile, yes or no?

A. Yes.

Q. And where was Officer O'Leary when he said something?

A. He was on the other side of Commonwealth Avenue.

Q. That would be the outbound lane?

A. Yes, sir.

Q. And where was the automobile?

A. The automobile was right close.

Q. Pardon?

A. The automobile was a little distance from the Officer.
Q. Headed in what direction?
A. Headed towards Mass. Avenue in the out lane.
Q. What did you hear Officer O'Leary say?
A. Get out of the car.

Mr. Colicchio: I object.
The Court: Wait a minute.
Mr. Colicchio: I'll withdraw the objection.

A. Get out of the car.
Q. And did you see anyone get out the car?
A. No, sir.
Q. Did you hear anything?
A. I heard two shots.

[Tr. 452] JOHN NEGNA, Sworn.

Direct Examination.

Q. Were you in the vicinity of Exeter and Boylston Streets on the night of August 1st last?
A. I was.
Q. Were you in an automobile or on foot?
A. An automobile.
Q. Did something attract your attention in that area?
A. Yes.
Q. Where were you when your attention was attracted?
A. Just at Boylston and Exeter Street.
Q. What is it that attracted your attention?
A. I heard this fellow running past the drug store and hollering, "Robber, robber" so quickly I made my right turn when I see him going to that direction, and I picked up the fellow that he was chasing.
Q. Describe the fellow he was chasing?
A. Yes. He was colored.
[Tr. 453] Q. Do you see him in the court room?
A. Yes.
Q. Will you point out to his Honor and the jury where he is?

A. The man on the right there, sir.

Q. You are pointing to the man in the enclosure on your right?

A. Right.

Mr. McAuliffe. May the record show, your Honor, that the witness is pointing to the defendant Johnson?

Mr. Colicchio. No objection.

The Court. There being no objection, the record will show that.

Q. The man you saw chasing him and hollering, "Robber", do you know who that man is?

A. Yes, I found out it was Mr. Berman.

Q. Mr. Berman, all right. After seeing this—You are still in your car?

A. Still in my car, yes.

Q. What did you do?

A. Well, as I heard him holler, I made a right turn on Exeter Street. As I went straight ahead I wanted to see what was going on.

The Court. What did you do, not what was in your mind. What did you do?

A. I just kept right on going until I followed the fellow that was running, that this Mr. Berman was chasing.

[Tr. 454] Q. Yes?

A. And he was half trotting, going up to Newbury Street, and I made my turn right up to Newbury Street off Exeter, and as I see him, he was running on the sidewalk, trotting on the sidewalk.

Q. Which sidewalk?

A. On the left side going up towards Fairfield Street,

Q. Yes?

A. I turned my car and went right up towards Newbury Street heading toward Fairfield. He was on the sidewalk and there was cars parked in between me and my car, as I am going right along, and he is half trotting, going along, and, finally, when I got halfway between Neubury, Exeter Street and Fairfield, there were two young fellows approached him, coming towards him, and at that time I heard Johnson turned his face towards my side of the car, and over the parked cars, and saying, "The fellow down

back here is hollering, 'Robber, robber'," so I just kept right on going and he was going along. So when I got to Fairfield Street he got there before me and made a right turn heading towards Commonwealth Avenue. When I got to Fairfield Street, I gave up the chase because I no longer——

The Court. Not because.

Q. You got to where?
A. Fairfield Street.
[Tr. 455] Q. What part of Fairfield Street?
A. Right at the corner of Neubury and Fairfield.
Q. What did you do there, stop?
A. I stopped right then and I seen him go across towards Commonwealth Avenue.
Q. Saw who?
A. Johnson.
Q. Where was he when you saw him going across Commonwealth Avenue?
A. No, it is when I left him right at Fairfield Street.
Q. Yes.
A. Right then a car came alongside of me.
Q. Yes.
A. And this car, there was a police officer in it.
Q. Yes.
A. That's what made me continue——

Mr. Colicchio. No.
The Court. No, no.

Q. A car came along with a police officer, is that right?
A. Yes.
Q. What did you do?
A. Well, I says——

The Court. No.

Q. Did you say something to the police officer in the car?
A. Not the police officer.
Q. Yes or No?
A. To the driver.
Q. You said something to the driver, is that right?
A. Yes.
[Tr. 456] Q. What did the driver of that car do and what did you do?

A. I——

Q. Not what you said or he said, what did you do, what did he do?

A. I said that he was——

The Court. No.

Q. No, no, please. We assume you said something to the driver?

A. That's right.

The Court. Now listen to the next question. Just listen to it.

Q. What did the driver of that car do after you spoke with him?

A. He made a right turn.

Q. To where?

A. Towards Commonwealth.

Q. Where were you?

A. I was on the left side.

Q. What did you do?

A. I followed it.

The Court. In your car?

The Witness. In my car.

Q. And how far did you follow this other car with the police officer in it?

A. I followed him right to Commonwealth Avenue.

Q. Yes.

A. And he made a right turn, and I made a right turn.

Q. Yes?

A. We went into about the length of three cars into Commonwealth, going into town. He parked on the right side and I parked on the left side. Just as I parked on the [Tr. 457] left side, I happened to see across the Mall this Johnson running across.

Q. Yes?

A. And right then I turned to the car and I said, "There he goes."

The Court. No, not what you said.

Mr. McAuliffe. No, no. What did you see the police officer do, if anything?

A. He came running by my car with his gun in his hand.

Q. Where did he go?

A. He went straight across the Mall.

Q. Where was Johnson?

A. He was halfway across when he entered, when he put his foot on the Mall, O'Leary put his foot on the Mall.

Q. Yes.

A. Johnson was about halfway across the Mall.

Q. Did you follow him as to where he went?

A. I got out of my car and chased, went after the chase on foot.

Q. Yes?

A. And O'Leary was halfway, I was about twenty feet off from the curbing into the Mall.

Q. Yes?

A. And I continued halfway when, could I say——

Q. What you saw.

A. And then I saw O'Leary holler, "Police officer, get out of the car."

Q. Did you see a car?

A. There was a car right at Commonwealth Avenue heading toward Mass. Avenue.

[Tr. 458] Q. And in what lane was it?

A. It was on the left lane going down.

Q. Where was it with reference to the Mall, on that side?

A. It was about identically opposite from where I got off my car onto the other side.

Q. What kind of a car was it?

A. It was a convertible.

Q. Did you have a chance to see the color?

A. Not the color, but the only color I see was the canvas on the convertible.

Q. Now, where was this car when you first saw it?

A. It was parked opposite me.

Q. On the other side of Commonwealth?

A. On the other side of Commonwealth.

Q. Where was Officer O'Leary when you heard him say something?

A. He says, "Police officer, stop."

Q. Where was Officer O'Leary when he said that?

A. He was about 25 feet or 40 feet away from it.

Q. Away from what?

A. From the car.

Q. Was he still on the Mall?

A. Still on the Mall.

Q. Where was the man that he was chasing?

A. He had just rounded the front of the car.

Q. He went around the front of the car?

A. Front of the car.

Q. What did you see him do?

[Tr. 459] A. When he ran around the front of the car, to my knowledge that was, I thought he went right——

The Court. No.

Q. What did you see him do?

A. I see him go right around to the passenger side of the driver.

Q. Passenger side of the car?

A. Of the car, yes.

Q. Go ahead.

The Court. Well, wait a minute now. What is the next question? What did you see after that?

Mr. McAuliffe. All right. Where was Officer O'Leary?

A. O'Leary then had seized the driver because the driver—

The Court. No, not because. What did you see?

Q. What did O'Leary do?

A. O'Leary ordered the driver out of the car.

Q. Yes.

A. The driver did get out.

Q. Yes?

A. And as he got out of the car, O'Leary left him and went to the front of the car.

Q. Yes?

A. And he went to the passenger side of the driver and then I couldn't see any more, but I heard two shots.

Q. Yes?

A. And when I reached there, O'Leary was down and the car had gone, and then the crowd gathered around, and when I got there he was down on the ground.

Q. I see.

A. And the car had taken off.

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[Tr. 479] Cross-examination.

By Mr. Colicchio:

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Q. And what was Mr. Johnson wearing?
A. He had a black coat on, raincoat.
Q. A what?
A. Black raincoat, and a white silk cap.

• • • • •

[Tr. 483] Q. Now, at sometime you went to the police station, the headquarters to view a lineup, is that right?
A. Yes.
Q. Will you tell us when you went there?
A. I think it was about 3:00 in the morning.
Q. Of August 2?
A. It would have, if that was the date.
Q. And did you view a lineup?
A. Yes.
Q. How many people were in the lineup?
A. Seven or eight, I couldn't——
Q. Were they all colored men?
A. Now, that is gone past me now, I would say that I recall that——
Q. Pardon?
A. I couldn't recall that.
Q. You can't recall whether they were all colored men?
A. No.
Q. Can you recall whether or not any of the men that you viewed had a topcoat on?
A. No.
Q. No, they didn't, or no, you cannot recall?
A. No, he didn't have the topcoat on.
[Tr. 484] Q. None of the men had a topcoat on?
A. I can't say that. I was only——

The Court; No, just answer the question.

The Witness: No, I can't.

The Court: Don't give any reasons for any lapse of memory, just answer the question.

The Witness: No, I can't say.

Q. You can't tell. Do you recall seeing the defendant, Johnson, in the lineup?

A. Yes.

Q. Do you recall what he was wearing?

A. Right there, yes, a torn shirt.

Q. What was he wearing?

A. A torn shirt.

Q. A torn shirt. Did he have trousers on?

A. Yes.

Q. Were they torn?

A. I don't recall whether they were torn or not.

Q. Did you observe whether or not there was any blood in his face?

A. No.

Q. No, there was not any blood in his face?

A. There was no blood on his face.

Q. No blood on his face. How close did you get to Mr. [Tr. 458] Johnson?

A. At the lineup?

Q. Yes, at the lineup.

A. About the same distance right here, from right now.

Q. Would you tell me what you say that distance is in feet?

A. Ten, fifteen feet.

Q. You saw no blood on his face?

A. No.

. . . . . .

[Tr. 486] Q. You had never seen the full face of this man that Mr. Berman was chasing?

A. You say I never did?

Q. Yes.

A. I seen the full face.

Q. You did?

A. I did.

Q. And where was this that you saw it?

A. Right opposite my car as he was running.

[Tr. 487] Q. Is that when he was running?

A. On Newbury Street.

Q. On Newbury Street. This is when he is about three buildings down on Newbury Street?

A. Yes.

Q. And you saw his full face?

A. Right.

Q. As you are driving along with cars both to your left and right?

A. Right.

Q. Did you stare at it for a long time?

A. Did I stare at it? He turned around long enough for me to look at him because I was hollering——

Q. No, not—So that when you are driving along you just turned and looked at him and stared at him?

A. Yes.

Q. And how fast were you going?

A. I would say ten miles an hour.

Q. Ten miles, and he was walking?

A. Trotting.

* * * * *

[Tr. 494] ROBERT S. TAYLOR.

Direct examination.

By Mr. McAuliffe:

* * * * *

A. Barbara Cox.

Q. And with her did you go some place from Marlboro Street?

A. Yes, sir.

Q. And in your automobile?

A. Yes, sir.

Q. You were the operator?

A. Yes, sir.

Q. And eventually did you get onto Commonwealth Avenue?

A. Yes, sir.

Q. When in the vicinity of Exeter Street and Commonwealth Avenue did something attract your attention?

A. Exeter Street and Commonwealth Avenue. Well, I was just passed Exeter Street.

Q. Passed what? Exeter Street?

A. That is right.

Q. On Commonwealth Avenue?

A. On Commonwealth Avenue.

Q. Going out of town towards Mass. Avenue?

A. Right.

Q. What attracted your attention, sir?

A. Two shots.

Q. Two shots. And as a result where did they come from, what direction?

A. Well, ahead of me.

[Tr. 495] Q. Ahead of you on Commonwealth Avenue. And as a result of this what did you do?

A. Well, I noticed a car parked in the left lane as I was approaching.

Q. What type of a car?

A. It was a convertible.

[Tr. 496] Q. A convertible, yes, and what else did you notice about the car?

A. Well, I noticed that somebody in a white shirt come out of the car and fall on the road, away from the car and fall on the road.

Q. On what side of the car——

The Court. I am afraid some of these jurors are not getting this testimony, Mr. McAuliffe. The witness is dropping his voice.

You are dropping your voice. Maintain the intensity of your voice, if you will, so that the jurors will hear it without straining.

Q. After hearing the shots, what attracted your attention?

A. A car parked in the left lane.

Q. Yes, a convertible, you say?

A. A convertible, yes.

Q. All right.

A. And it, I saw a man in a white shirt fall away from the car and onto the road, to the right of the car as I was approaching it.

Q. To the right of that convertible as you faced it, is that right?

A. That is right.

Q. As a result of that, what did you do, sir?

[Tr. 497] A. I proceeded on to where this happened and we pulled up to the man that was lying on the street.

Q. And can you identify the man as to his clothing?

A. Yes, I knew he was a policeman. I stopped right beside him.

Q. And did you talk with somebody there, Yes or No?

A. Yes.

Q. As a result of talking with somebody, what did you do?

A. I chased the car that was parked at the left when I approached.

Q. And will you tell his Honor and the jury, please, just where you chased that car?

A. I chased the car down Commonwealth Avenue. We went over Mass. Avenue, and I chased him to the exit of, coming off Storrow Drive.

Q. Yes.

A. And I stopped, he turned left on the exit from Storrow Drive, towards the Braemore Hotel.

Q. Yes.

A. And I stopped then behind him, still headed out of town on Commonwealth Avenue.

Q. Yes?

A. Then I called his number out to the, Miss Cox, who was with me, and she wrote it down on a piece of paper, [Tr. 498] his license number.

Q. You mean the registration number?

A. The registration number, yes, sir.

Q. And how many in that car, this convertible, the registration number of which you dictated to Miss Cox?

A. How many people were in the car?

Q. Yes.

A. There was only one that I could see.

Q. Can you describe the man?

A. He looked large, from what I could see. I could only see from about here up. He looked large and he was a Negro and that's about all I could describe of him.

Q. Now, did you notice the rear of the top of this convertible car, whether or not there was a window in it?

A. No, there was no window. The window was open.

Q. While this car that you took the registration number of was stopped, did you notice this man in the car do anything while he was stopped?

A. Yes, he took off his coat.

Q. And just in what manner did he remove the coat, take it off?

[Tr. 499] A. Well, he sort of leaned away from the wheel, and took his coat off like so.

Q. Just like that, you still behind him?

A. I was still parked right behind him at this point, yes.

Q. Tell us what kind of a coat it was, as to color?

A. I only noticed that it was a dark coat. It looked dark.

Q. Did you follow that car after this incident on——

A. After I got the number, I followed him no longer. I went right on Commonwealth Avenue.

Q. Do you know where he went, that car went?

A. No, that's the last I saw of him.

Q. You told his Honor and the jury it was facing left toward the Braemore Hotel, is that right?

A. That is right.

Q. That would be facing towards the Fenway?

A. That is right.

Q. And did your friend, Miss Cox, give you something that she had written the number down on?

A. Well, after we went back to the scene where I had first seen this, then she gave me a piece of paper that she had copied the number on.

Q. Was that the number that you dictated to her, that [Tr. 500] appeared on that piece of paper?

A. Yes.

Q. I show you this, sir, and ask you if that is the number that you took off that car, that chased, and gave to your friend, Miss Cox, to write down?

A. That is the number, as I remember it, yes.

Q. What did you do with that when you returned to the scene?

A. I gave it a policeman.

[Tr. 566] JOSEPH EDWARD MCCABE.

Direct examination.

By Mr. McAuliffe:

* * * * *

Q. And in response to a summons have you produced here the official registration records for 1963 of Registration R76, 698?

A. I have.

Q. Have you also the 1962 registration record of the same car?

A. A copy.

Q. A copy of it?

A. Yes.

Mr. McAuliffe: Any objection?

Mr. Balliro: No.

Mr. Colicchio: No.

Mr. McAuliffe: I offer these, Your Honor. May they be marked as one Exhibit, A and B, please?

The Court: Yes. These may be marked Exhibit number 10A and 10B, chronologically: 10A, 1962; 10B 1963.

(Received and marked as Ordered.)

Mr. McAuliffe: May it please the Court, Mr. Foreman, ladies and gentlemen of the jury: Exhibit 10A, the witness testified is the 1962 registration of automobile bearing the registration R—excuse me. I will withdraw that. Is the [Tr. 567] official registration of the automobile that in 1963 was registered with the number, R76,698. The record shows a Herbert Groves, Jr., 15 Elm Hill Avenue, Boston, Buick convertible, color: bronze. Ronald Johnson, 16 Devon Street, Roxbury. Note the same numbers identifying the car in each record.

Mr. Balliro: If Your Honor please, it may save time with a stipulation. We will stipulate that the automobile was an automobile that was registered in the name of Graves, in spite of the fact the record says, "Groves." And for the record it was purchased from the co-defendant Ronald Johnson.

* * * * *

[Tr. 571] ROBERT F. LAWRENCE.

Direct examination.

By Mr. McAuliffe:

* * * * *

Q. Did you talk with a young man?
A. Yes, I did.
Q. Did he give you something?
A. He gave——
Q. Yes or No?
A. Yes, sir.
Q. I show you Exhibit 9, and ask you to look at it.
A. Yes, sir.
Q. That was given to you?
A. Yes, sir.
Q. As a result of being given this, did you forward some information?
[Tr. 572] Yes, I did.
Q. By what means?
A. The police radio.

* * * * *

[Tr. 584] JOHN J. SANTINO.

Direct examination.

* * * * *

Q. Sometime after nine o'clock, did you receive some information over your radio?
A. Yes, sir.
Q. Where were you when you got this information?
A. Eliot Square in Roxbury.
Q. What did you do when you got this information?
A. We proceeded from Eliot Square to Louis Prang and Fenway.
Q. To Louis Prang Street and the Fenway?
A. Yes, sir.

[Tr. 585] Mr. Balliro: May we have the "we" identified, may it please the Court?
Mr. McAuliffe: Mr. Hoffman, he said.

Q. Is that right?

A. Yes, Patrolman Hoffman and myself.

Q. Were you the operator of the automobile or the observer?

A. I was the observer.

Q. When you got to Louis Prang Street and the Fenway did you stop there?

A. For——

Q. Yes or No?

A. Yes.

* * * * *

[Tr. 586] Q. Now while stopped there did something attract your attention?

A. Yes, sir.

Q. What was it?

A. A Buick convertible, same description as was given over the radio.

Q. You had a description of an automobile, did you?

A. Yes, sir.

Q. Did you also have the registration number?

A. Yes, sir.

Q. While stopped there, did you see that car?

A. Yes, sir.

Q. Where did it come from?

A. It came from our right-hand side on the Fenway.

[Tr. 587] Q. On the Fenway?

A. Yes, sir.

Q. Upon seeing the car, what did you and your partner do?

A. We proceeded out of Louis Prang Street onto the Fenway and pulled up almost alongside of the Buick.

Q. Keep your voice up.

A. Almost alongside of the Buick. We pulled up almost alongside of it.

Q. You were in the observer's seat.

A. Yes, sir.

Q. Where was this automobile, this Buick, with reference to where you were sitting?

A. It was on my right.

Q. How close?

A. It was very close. I am not really sure just how many feet. I couldn't actually——

Q. Did you see the operator of the car?

A. Yes, sir.

Q. Who was the operator?

A. The defendant, Mr. Johnson.

Q. Will you point out to his Honor and the jury, please, the operator of the car? Walk down and point him out if he is in the court room?

[Witness goes to rear of bar enclosure on the right.]

A. This man [indicating Mr. Johnson].

Q. All right, sir. Step back. Now will you tell his Honor and the jury after approaching the car as you say in the manner in which you did, what did that car do and what [Tr. 588] did you and your associate do?

A. The car pulled forward ahead of us and then took a left onto Palace Road. We proceeded left on Palace Road, which was going the wrong way on a one-way street. We gave out the information to the dispatcher that we were chasing——

Mr. Colicchio. I pray your Honor's judgment.

The Court. No, not what you said, just what you did. You used a radio?

The Witness. We used the radio.

The Court. All right.

Q. In using the radio was the subject matter of your talk what you were observing, yes or no?

Mr. Colicchio. I pray your Honor's judgment.

The Court. He may answer Yes or No.

Mr. Colicchio. Note my exception.

Exception No. 41.

The Court. Answer Yes or No.

A. Yes.

Q. Tell us what you continued to do?

A. We continued up Palace Road and the Buick then took a left on Longwood Avenue. We followed it, taking the left on Longwood Avenue. Then the Buick ran a red light at Longwood and Huntington, taking a right at that time and striking a vehicle.

[Tr. 589] Q. Striking a vehicle?

A. Yes, sir.

Q. Where?

A. At Longwood and Huntington Avenue.

Q. Yes.

A. At that time the vehicle started up Huntington Avenue and I took out my police revolver and fired five shots at the vehicle. We continued up Huntington Avenue through Brigham Circle up to Wait Street. The Buick then took a left on Wait. We proceeded after it, up to Hillside Street, taking a right on Hillside Street. The Buick then continued on Hillside Street until it came to Parker Hill Avenue, taking a left on Parker Hill Avenue, going up to Sunset Street, taking a left on Sunset Street. At that time the Buick struck a wall on Sunset Street and continued down Sunset Street, taking a right on Hillside Street, then a left onto Frawley Street, and we proceeded, we stopped for——

The Court. Speak up.

A. Momentarily we were stopped at Sunset Street by a Special Service Car.

Q. You were stopped by a car coming up——

A. Yes, sir.

. . . . . .

[Tr. 591] Q. Well, did you hear anything at the corner of Frawley Street and Huntington Avenue, after this buick went down Frawley Street? Did you hear anything?

A. Did I hear anything? No, sir.

Q. Did you hear a crash at any time?

A. Oh, yes, sir.

Q. Where did that come from?

A. They came, when the Buick struck the MTA bus.

Q. Where were you when the Buick struck the MTA bus?

A. We were up the top of Frawley Street.

Q. Up at the top of Frawley Street?

A. Yes.

Q. What, if anything, did you observe down at the corner of Frawley Street and Huntington Avenue, after the Buick struck the MTA bus?

A. We observed a man getting out of the Buick.

Q. Who was the man?
A. The defendant, Mr. Johnson.
Q. Yes.
A. And running.
Q. Keep your voice up.
A. Getting out between the Buick and the bus and running down to the rear of the bus and around the rear of the bus.
[Tr. 592] Q. To where?
A. To Kempton Street.

• • • • •

[Tr. 594] Q. After the crash down at Frawley and Huntington, what did you observe about him as he went behind the bus?
A. He seemed to be limping.

• • • • •

[Tr. 605] JOHN SANTINO.

Cross-examination.

By Mr. Colicchio:

• • • • •

Q. Did you have occasion to see the defendant Ronald Johnson some time after you say you saw him driving the car?
A. Yes, sir.
Q. When was the next time you saw him?
A. I saw him in the Station House, sir.
Q. Which station?
A. District 10.
Q. And what time was that?
A. About 9.26, 9.27, some time like that.
Q. And where was he at Station 10?
A. He was in the guardroom.
Q. And who else was present in the guardroom at that time?
[Tr. 606] A. Several officers. I don't exactly know. They were from different divisions. And Lieutenant Richardson was there.

Q. Lieutenant Richardson?

A. Yes.

Q. How long did you remain in the defendant Johnson's presence down at Station 10 that evening?

A. Maybe a minute.

Q. A minute. Did you see him some time after that occasion?

A. No.

Q. You did not?

A. No, sir.

Q. When was the next time you saw the defendant Johnson?

A. Today, sir.

Q. So that, subsequent to seeing him in the car the only other occasion you had to see him was for about a minute at Station 10 on the evening of August 1st, right?

A. Yes, sir.

Q. When you saw him down at Station 10 on the evening of August 1, you looked at his face? You looked at his face?

A. Yes, sir.

[Tr. 607] Q. Any blood on his face?

A. On the side.

Q. On the side?

A. Yes, sir.

Q. Of his face?

A. On the side, right here, on the side of his head.

Q. The side of his head?

A. Yes, running down his face, it seemed to be doing.

Q. Did you see whether or not there was any cut or bruise in the area of the blood flow?

A. I didn't examine him that close, sir.

Q. Was that the only blood you saw on his face?

A. I believe a little blood from the nose.

[Tr. 618] OFFICER JOHN F. HOFFMAN.

Direct examination.

By Mr. McAuliffe:

A. Well, after my partner chased the subject into Kempton Street, I went over to the Buick convertible and on the ground underneath the driver's side I found a snub-nosed revolver.

Q. I show you, sir, Exhibit 6, and ask you whether or not you recognize it?

A. Yes, that's the gun.

Q. You found that underneath the driver's seat?

A. No.

Q. On the ground?

A. On the ground.

Q. Under the——

A. Under the automobile.

[Tr. 656] TYLER HENRY DAY, JR.

Direct-examination.

By Mr. McAuliffe:

Q. Were you on Huntington Avenue on the evening of August 1, 1963?

A. Yes, sir.

Q. And were you in an automobile?

A. Yes, sir.

Q. Accompanied by somebody?

A. Yes.

Q. Who?

A. Miss Elaine Halkopoulos.

Q. And in the vicinity of Longwood Avenue and Huntington Avenue did something attract your attention?

A. Yes, sir.

Q. What was it?

[Tr. 657] A. Several loud cracking shots, as if a car had backfired or something.

Q. And where were you when you heard this?

A. Approximately next to Shattuck Street. It was on my right.

Q. And that would be between Longwood Avenue and Brigham Circle?

A. Just about midway, I'd say.

Q. And as a result of this what, if anything, did you see?

A. My attention was attracted in my rear view mirror and I saw an automobile approaching from my rear at a very rapid speed. So I pulled over to the side of the road and let this automobile go by.

Q. What kind of an automobile was it?

A. It was a tan Buick convertible, I think, a 1955— I don't know.

Q. A tan Buick convertible?

A. Yes, sir.

Q. And did you notice how many people were in the car?

A. No, sir.

Q. And what was the speed of the car?

A. At a rapid rate of speed, sir.

Q. And did you follow the car as to where it proceeded? [Tr. 658] A. I continued on my original course, which was toward Brigham Circle in a westerly direction.

Q. And where did this Buick car go that you testified about?

A. I didn't see where it went. I had just continued on through Brigham Circle in a westerly direction where I noticed a lot of confusion with police vehicles and this type of thing, going to my left up on Mission Hill, on the various streets. And I continued on my path down Huntington Avenue until I was right next to Kempton Street, which was my destination. And then my attention was once again attracted to the automobile coming down Frawley Street to my left.

Q. Yes. And describe what you saw. This same automobile coming down Frawley Street?

A. It was a tan—I couldn't see at that time what kind of an automobile it was; but this automobile was coming down toward me at a very rapid rate of speed. And I was looking up at this automobile coming down and my first reaction was to back my automobile back to the left. In other words, backing it back in an easterly direction on to

Huntington Avenue into a bus stop, to get out of wherever this automobile might come to. And it was then that an MTA bus, going in an easterly direction on Huntington [Tr. 659] Avenue was parallel to me at the foot of Frawley Street, where I heard this tremendous crash of this automobile that was coming down the street.

Q. And the bus?

A. And the bus, yes, sir.

Q. What did you notice happen to the bus as a result of this crash?

A. I noticed the bus to move over at least one or two feet, to the bus's left, toward me, from the impact of the automobile.

Q. And you were on Huntington Avenue at this time?

A. I was at the corner of Huntington Avenue and Kempton Street, on the north side of Huntington Avenue, yes.

Q. Were you on the east side or the west side of that intersection on Huntington Avenue?

A. The east side, sir.

Q. That would be on the intown side?

A. Yes.

Q. Now, after you saw happen what you just described, what else did you observe?

A. Well, my attention was directed mostly toward the bus because of my occupation, I believe; but at that time I did see a man run out from behind the bus, coming toward [Tr. 660] me, like this, and run about five to ten feet in front of me, down Kempton Street.

Q. Can you describe the man?

A. He seemed to be a rather heavy-set fellow and had a rather large face; and was negro; but that was, I think, my attention was directed more back toward the bus——

Q. I only asked you to describe the man. You gave us a description, and a negro, is that right?

A. Yes, sir.

Q. Did you notice the manner in which he proceeded there?

A. He seemed to be, rather seemed to me to be moving rather fast, but not going too fast. In other words, it seemed to me as though he had a limp or drag of one of his legs that was hampering his progress.

• • • • •

[Tr. 665] HELEN ELAINE HALKOPOULOS.

Direct examination.

By Mr. McAuliffe:

* * * * *

A. I saw an MTA bus coming towards us on the other side of the street and I saw the first car crash into it and knock the bus aside. I then saw a man coming from around the bus running right in front of us, turn to look over his shoulder, and he continued to run down Kempton Street.

Q. How did he run?

A. Sort of in a limping sort of a gait, sort of holding on, sort of holding on to his leg, and sort of limping along, gimpy.

[Tr. 666] Q. Did you get a look at the man?

A. Yes, I did.

Q. Can you describe him?

A. Well, he was very heavy, Negro, dark, a very round head, round face, short hair on top, and the expression on his face, if I can describe that, seemed to be one of complete terror. That is the expression I most remember.

Q. Do you see the man here in the court room?

A. I believe so.

Q. Can you point him out, please?

A. I believe it was that man there [indicating].

* * * * *

[Tr. 681] POLICE OFFICER ANTHONY RUZZO.

Cross-examination.

By Mr. Colicchio:

Q. Officer, you saw the defendant Ronald Johnson down at Station 10 that night?

A. Yes, sir.

Q. Can you tell me about what time it was when you first saw him at the station?

A. No, I would not be able to say.

Q. Where was he when you saw him at Station 10?

A. He was standing at the booking desk.

Q. At the booking desk?

A. Yes, sir.

Q. Was he handcuffed?

A. I don't believe so.

Q. Were there other police officers around him?

A. Yes, sir, there was one on each side of him.

Q. Did you have an opportunity to observe his face at that time?

A. I don't recall.

Q. Was he facing the booking desk at the time?

A. Yes, sir.

Q. Were you behind him?

A. Yes, sir.

Q. Did you have a chance to observe his head at that time?

[Tr. 682] A. I believe there was a little cut on his head, yes.

Q. You believe there was a little cut?

A. I saw some blood on his head, yes.

Q. Did you observe whether or not there was any blood on his face at that time?

A. No, sir.

Q. Did you have occasion to see him at Station 10 after the occasion at the booking desk?

A. As I say, yes.

Q. Where was it you saw him the next time?

A. He was standing in the guard room and I believe Lieutenant Donovan was talking to him.

Q. About what time was this?

A. I have no knowledge.

Q. How long after you had seen him at the booking desk was it you saw him in the guard room?

A. I couldn't say. It was some time later, though.

Q. Can you tell me approximately how long after you saw him at the booking desk it was you saw him in the guard room?

A. I don't think I could.

Q. Well, you are talking about ten minutes later?

A. Oh, no.

Q. An hour later?

[Tr. 683] A. It would be well over an hour later, I would think.

Q. Well over an hour?

A. Yes.

Q. It would be as long as two hours later?

A. I couldn't say.

Q. But you know it was well over an hour?

A. I would approximate it somewhere around there.

Q. And he was standing, just standing in the guard room?

A. I believe at the time they might have taken him out of the cell block. He had already been locked up.

Q. There were other officers in the guard room other than yourself at that time?

A. There were many officers in the guard room all night.

Q. Can you tell us who the other officers were that were in the guard room with him?

A. Well, as I say, there was Lieutenant Donovan, Captain Cummings; I believe Officer Hayes was there, and there was several other officers, many of whom I didn't even know.

Q. At this time, did you have an opportunity to see the defendant Johnson's face?

A. I might have looked at it, yes, but I——

Q. Did you notice anything unusual about the appearance of his face at this time?

[Tr. 684] A. I might have looked at it, yes, but——

Q. Did you notice anything unusual about the appearance of his face at this time?

A. No, sir.

Q. Did you notice any swelling of any portion of his face at this time?

A. No, sir.

Q. Observe any blood on his face at this time?

A. No, sir.

Q. Do you recall what defendant Johnson was wearing when you saw him in the guard room at this time?

A. No, I don't.

Q. Do you recall making any observations of the trousers that he was wearing at this time?

A. No. All I think I can recall is his chest being exposed, a section of his chest showing. That's all I can recall.

Q. At the guard room on this occasion, did you observe any blood on the defendant Johnson on any part of his body?

A. No, sir.

Q. None whatsoever?

A. None at all.

Q. And you had occasion at this time to make observations about the rear of Mr. Johnson and the front of Mr. [Tr. 685] Johnson?

A. Yes.

* * * * *

Redirect examination.

By Mr. McAuliffe:

Q. I understand you to say, Officer Ruzzo, that you saw some blood on the head of the defendant Johnson at the [Tr. 686] booking desk when he was being booked?

A. Yes, sir.

* * * * *

[Tr. 690] SERGEANT JOHN CHALPIN.

Cross-examination.

By Mr. Colicchio:

Q. Sergeant, did you have occasion to see the defendant Ronald Johnson down at Station 10?

A. Yes, sir, when I booked him.

Q. About what time was that, sir?

A. Approximately 9:40; 9:35, 9:40, somewheres around there.

Q. When you first observed him where was he at the station?

[Tr. 691] A. In the front of the desk.

Q. Can you tell me who was present besides the defendant Johnson at the desk?

A. Patrolman Vincent Hayes and Patrolman Henry Coyne.

Q. Pardon?

A. Patrolman Vincent Hayes and Patrolman Henry Coyne.

Q. Were they the only two police officers?

A. Well, there were other officers behind them.

Q. How many other officers were behind the defendant Johnson?

A. I couldn't tell you offhand.

Q. Do you know who they were?

A. Well, they were from the Tactical Patrol force, our own division, and some of the special officers, I believe.

Q. Did you observe Mr. Johnson being brought in to the station?

A. No, sir.

Q. When you saw him at the booking desk, did you get a chance to look at his face?

A. Yes, sir.

Q. Was it bleeding?

A. His face was not bleeding, no, sir.

Q. Was there any swelling to any portion of his face?

A. Not that I noticed.

Q. Did you have an opportunity to observe the clothing [Tr. 692] he was wearing at that time?

A. Well, light summer-type clothing. I believe it was a dark summer shirt, some kind of a design, dark brown.

Q. Did you notice the condition of the shirt at that time?

A. It was open in the front. I don't know whether the buttons were torn off or not, but it was open, partially open in the front.

Q. Did you notice the condition of the trousers at that time?

A. The desk is up too high for me, no, sir.

Q. Did you observe any blood on the defendant?

A. Yes, sir.

Q. Where was the blood that you observed?

A. It was coming from the back side here, laceration down to the front of the chest.

Q. To the front of the chest?

A. Yes.

Q. And did you observe blood on the chest?

A. Yes.

Q. Did he have a T-shirt on?

A. Not that I recall, no, sir.

Q. Any undershirt at all?

A. No.

Q. Did you observe whether or not there was any blood on the outer shirt that he was wearing?

A. I believe there was, yes.

Q. Do you recall whether or not you observed some blood on it?

[Tr. 693] A. Well, it was brown and I imagine——

Q. No.

A. I think there was some on there. I couldn't tell you the definite pattern of blood or anything, but it was coming down from the head across through the chest.

Q. Did you observe whether or not there was any blood on his trousers?

A. No, the trousers were down below. The desk sits up too high.

Q. So that you only observed that portion of him that was above the desk?

A. That's right, yes.

Q. Were you standing behind the desk?

A. Yes, sir.

Q. How long did you remain at the desk while he was being booked?

A. Well, as long as it takes to be booked, a matter of five or ten minutes.

Q. You remained for the complete booking?

A. Yes.

Q. Was he asked to turn around for you at the booking desk?

A. No. He was being held. He was putting up such a struggle and cursing.

Q. Did you have occasion to observe him any time after the booking?

A. Yes, sir.

Q. At Station 10?

A. Yes, sir.

Q. About what time was this?

[Tr. 694] A. It was shortly after that, a matter of minutes, that we had called for the doctor that does our emergency work for us.

Q. You had a doctor observe him at that time?

A. Dr. Laserson, yes, sir.

Q. Dr. Laserson?

A. Yes.

Q. What time was it that the doctor arrived?

A. It was shortly after the booking. As far as minutes go

I couldn't tell you exactly. It was after the booking when I observed him, the laceration.

Q. Well, can you tell me approximately what time it was that the Doctor arrived?

A. No, I couldn't tell you exactly. I don't know about approximately either.

Q. Did he arrive——

A. He was still bleeding when the Doctor came.

Q. Did the Doctor arrive before 10 p. m.?

A. I couldn't tell you for sure.

Q. Did the Doctor arrive before 11 p. m.?

A. Oh, yes, because I had already gone out at 11 p. m.

Q. Were you present when the Doctor observed Mr. Johnson?

A. Yes, sir.

Q. Where was it in the station that the Doctor observed Mr. Johnson?

A. In the cell.

[Tr. 695] Q. And were you at the cell?

A. Yes, sir.

Q. Who else was present beside yourself and the doctor and Mr. Johnson?

A. I believe Patrolman Ruzzo was with me and Patrolman Coyne.

Q. Patrolman Ruzzo. Have you a recollection that Patrolman Ruzzo was with you in the cell at that time?

A. I believe the two of them were with me with the Doctor so we could control him while he was being examined.

Q. Did you observe the Doctor giving Mr. Johnson some treatment?

A. Yes, sir.

Q. Did the Doctor put some bandages on the defendant Johnson?

A. A Bandaid on the small laceration, yes, sir.

Q. He put a Bandaid on a small laceration?

A. Yes, sir.

Q. Where was this laceration?

A. On the back right side of the head up on the top here.

Q. That was the only bandage that was put on?

A. Yes, sir.

Q. How long did the Doctor stay in the presence of Mr. Johnson in the cell?

A. Well, he had him cleanse the wound and dry it off and put the Bandaid on there, talked to him, if he had any other wounds or ills or complaints, and it should be at least fifteen minutes, approximately that.

[Tr. 696] Q. And you were there during this period of time?

A. Yes, sir.

Q. And this Bandaid, did it stop the bleeding?

A. Yes, sir.

Q. And the defendant Johnson at that time had no swelling or anything on his face?

A. No, sir.

Q. And he had no other complaints?

A. No, sir, no complaints.

Q. Of cuts, marks, bruises?

A. No, sir.

Q. Did the defendant Johnson take off his chest for the doctor?

A. Yes, sir.

Q. Did you observe the area of the defendant's chest, stomach, back and shoulders at that time?

A. Yes, sir.

Q. Did you observe whether or not there were any marks or bruises on him?

A. No, sir.

Q. Did the Doctor have him take his trousers off?

A. Yes, sir.

Q. Did you observe the defendant's legs, both rear and front?

A. Yes, sir.

Q. Did you observe whether or not there were any marks or bruises at that time?

A. There were.

Q. Will you tell us where it was that you observed the [Tr. 697] marks or bruises?

A. Around the right knee, I believe he had several small, like, scratch marks.

Q. Small scratch——

A. And the palm of his right hand.

Q. And the palm of his right hand?

A. Right.

Q. Those marks that you observed on his legs, were they bleeding?

A. No.

Q. They were not?

A. No.

* * * * *

[Tr. 710] ROGER T. WHITE.

Direct examination.

By Mr. McAuliffe:

* * * * *

Q. Now, sir, I show you Exhibit 6 and ask you whether or [Tr. 711] not you recognize that?

A. I do, sir.

Q. And where did you see that first?

A. At the District 10 Station House.

Q. Now, having in mind Exhibit 6 and Exhibit 10, whether or not you made any examination?

The Court: Exhibit 12, I think.

Mr. McAuliffe: What is it? Excuse me. I will withdraw the question.

The Court: I am sure you want the record to be accurate in that respect, Mr. McAuliffe.

Mr. McAuliffe: Yes, I do.

Q. Well, Mr. White.

Mr. McAuliffe: I will withdraw that question.

Q. Directing your attention to Exhibit 6 and exhibit 12, did you make some tests in connection with both of those exhibits?

A. I did, sir.

Q. Tell, His Honor and the jury, what you did?

A. A comparison microscopic examination between the spent bullet I received at the Mass. General Hospital and a spent bullet fired by me from this revolver in evidence revealed that the spent bullet received from Doctor Edmonds at the Mass. General Hospital was fired from this revolver [Tr. 712] in evidence.

Q. Now, sir, I show you Exhibit 13 and ask you whether or not you have seen that before?

A. Yes, sir.

Q. Now, with reference to that exhibit and exhibit 6, whether or not you made any examination or test in connection with both of those exhibits?

A. Again, a comparison microscopic examination between this Exhibit 13 and a test-fired bullet, fired by me from this Exhibit 6, revealed that the spent bullet, Exhibit 13, was fired from Exhibit 6.

* * * * *

[Tr. 768] POLICE OFFICER LAWRENCE J. MCNAMARA.

Direct examination.

By Mr. McAuliffe:

* * * * *

Q. Did you observe the condition of Johnson either at the rear of this building or at any time from there up to the police box?

A. From in front of the house, not in the rear, it being too dark, from in front of the house up to the box, I did.

Q. What did you observe about him?

A. There was blood on his, appeared to be on the front of his shirt and a mark over, I believe it was, the left-hand side of his forehead.

The Court. Left? You point to your right.

The Witness. I am turning, your Honor—wait a minute. My left hand would be looking—it would be on his right side.

Mr. McAuliffe. You may inquire.

Mr. Balliro. I have no questions.

Cross-examination.

Q. [By Mr. Colicchio] You say you observed blood on his shirt?

A. I did, a couple of drops of blood, yes.

[Tr. 769] Q. A couple of drops of blood?

A. It appeared to be drops of blood, yes.

Q. What part of his shirt was the blood on?

A. It would appear to be right about here [indicating].

Q. The center?

A. A little bit to the right of center, yes.

Q. Was his shirt buttoned or unbuttoned?

A. Unbuttoned.

Q. And you also observed some blood on his forehead?

A. I did.

Q. And will you again point to where on the forehead you observed the blood?

A. As I recall, using my right hand now, it was approximately here [indicating].

Q. Did you observe whether or not there was any cut there in that area?

A. No, I didn't.

Q. And did you follow over to the police station?

A. I did.

Q. And you observed the defendant Johnson getting into a police car?

A. That's correct.

Q. Did you observe during any of this period of time any swelling on the defendant's Johnson's face?

A. No, I don't recall that.

Q. Did you observe any blood on either of his cheeks of [Tr. 770] his face?

A. I don't recall that.

Q. Did you observe any blood on the defendant Johnson on any other part of his body?

A. As I recall, there was a spot here and a couple of spots on the shirt.

[Tr. 779] POLICE OFFICER HENRY J. COYNE.

Direct examination.

By Mr. McAuliffe:

* * * * *

The Witness: There was a very bad accident and the police car was there.

Q. You got to the corner of Huntington Avenue and Frawley Street at sometime, did you?

A. Yes, sir.

Q. What did you see there?

A. A lot of confusion and a police officer was chasing a [Tr. 780] man.

Q. Did you see a bus?

A. Yes, sir.

Q. Did you see an automobile?

A. Yes, sir.

Q. Did you see an automobile?

A. Yes, sir.

Q. Did you stop to observe the condition of either one of those vehicles?

A. Yes, sir.

Q. What did you observe about them?

A. Well, the car had given the bus a real bad bang.

Q. As a result of that, and seeing some people on Kempton Street, did you do something?

A. Yes, sir.

Q. What did you do?

A. I asked——

The Court: No.

Q. You can't give us any conversation. What did you do?

A. I ran down Kempton Street.

Q. Tell us what you did after going down Kempton Street.

A. I went in between 11 and 15 Kempton Street in the alleyway and I crossed over into St. Albans, from St. Albans Road I went over to Fenwood Road, and I went in between in the rear of 20 Fenwood Road. When I got in [Tr. 781] the rear I saw a man underneath the porch.

Q. Yes. What did you do?

A. I told him to come out. There was another officer with me at the same time.

Q. Who was the other officer?

A. Officer Wagner of the Tactical Force.

Q. Now, this was the rear of 20 Fenwood Road?

A. Yes, sir.

Q. And what part of the building was it that you saw the man?

A. He was underneath the porch between some barrels there; there was a lot of barrels there.

Q. You told him to come out of there?

A. Yes, sir.

Q. Did he come out?

A. Yes, sir.

Q. And who was it?

A. Mr. Johnson.

Q. And tell us what took place there.

A. Well, we told him to come out and he said, "What you want me for?"

Mr. Balliro: I object. I ask this be limited to Johnson. [Tr. 782] The Court: I take it at this time it may be restricted to the defendant Johnson. This is not evidence against the defendant, Graves, at this point, ladies and gentlemen unless the Court should otherwise rule.

The Witness: I told Mr. Johnson to come out of there, and he come out, and he said, "What you want me for, I didn't do anything, I just snatched a bag," so we took him and he started to wrestle with us, a little fight; we took him out to the street. Then from there we walked him up to 46 box.

Q. Where is that located?

A. At Calumet Street and Huntington Avenue.

Q. Were you joined by other officers?

A. Yes, sir.

Q. Who were the other officers that joined you?

A. Oh, there was all kinds of officers there.

Q. By the way, was the defendant Johnson bleeding when he got out from underneath that porch?

A. Well——

The Court: Listen to the question.

Mr. Colicchio: Yes or no.

The Witness: Yes.

Q. How were you dressed, by the way?

[Tr. 783] A. I had a white shirt on.

Q. And what if anything did you observe about your shirt after you had apprehended Johnson under the porch and taken him out to the street?

A. I had blood on my shirt.

Q. You went between an alley at the two addresses that you mentioned at Kempton Street, is that right?

A. Yes, sir.

Q. And, I understood you to say you went over to St. Albans Road?

A. Yes.

Q. How did you get over to St. Albans Road from that alleyway?

A. I had to climb a fence.

Q. What type of fence was it?

A. It was a high wooden fence with barbed wire on it.

Q. And then to St. Albans Street you went to Fenwood Road?

A. Yes, sir.

Q. And then to the rear of 20 Fenwood Road, is that right?

A. Yes, sir.

Q. I show you Exhibit 2-WW, Mr. Coyne, and ask you if you recognize what appears on that exhibit?

A. Yes, sir.

Q. What is it?

A. That is the rear of 20 Fenwood Road.

[Tr. 784] Q. And will you illustrate to His Honor and the gentlemen of the jury where the defendant came out from?

A. Right here, Your Honor.

The Court: Just point to it, just point to it without saying anything.

Q. Now, you spoke of a police box 46?

A. Yes, sir.

Q. And did you have the defendant Johnson in custody at that box?

A. Yes, sir.

Q. And was he taken there, taken from that box to Division 10?

A. Yes, sir.

Q. Whether or not you accompanied him to Division 10?

A. No, sir.

Q. Who took the defendant, Johnson, to Division 10 from that box?

A. I believe it was Officer Hayes, Officer Steele, Officer Miland and some other officer, I don't know.

* * * * *

[Tr. 786] Cross-examination.

By Mr. Colicchio:

* * * * *

Q. The defendant, Ronald Johnson's hand was bleeding?

A. Well, I didn't see any blood until I was out in the street where it was light.

Q. When you got out to the street you saw that his hand was bleeding?

A. I didn't notice. All I knew is that I had blood on my shirt.

Q. Well, you didn't know then at that time whether or not he was bleeding?

A. He had some blood on his forehead.

[Tr. 787] Q. He had some blood on his forehead?

A. Yes, sir.

Q. And when did you first observe that?

A. Out in the street.

Q. In front of 20 Fenwood?

A. Yes, sir.

Q. And where was it that you saw, where on his body was it that you saw this blood?

A. On his head.

Q. Where, what part of the head?

A. Up on the forehead, I believe.

Q. The forehead?

A. Yes.

Q. Could you observe whether or not he had any cut or scratch there?

A. No, sir.

Q. Did you observe any blood on any other part of his body?

A. No, sir.

Q. Did you observe whether or not he had any other marks or bruises on his face?

A. No, sir.

* * * * * * *

[Tr. 792] PATROLMAN ROBERT C. WAGNER.

Cross-examination.

By Mr. Colicchio:

* * * * * * *

Q. When you took him out to the front of 20 Fenwood Road did you observe any blood on him?

A. When the handcuffs were being put on him I observed some blood.

Q. Where were the handcuffs put on?

A. Outside of 20 Fenwood Road.

Q. Who put the handcuffs on?

A. I couldn't say for sure, I think it was Officer McNamara.

The Court: Raise your voice.

The Witness: Officer McNamara, I believe, but I wouldn't say for sure.

Q. And at this time you observed blood on the defendant, Johnson?

A. Right.

Q. Where was it on his body that you observed the blood?

A. I think I noticed some on his cheek, I couldn't say which side; I remember seeing blood on his cheek.

Q. On his cheek?

* * * * * * *

[Tr. 795] POLICE OFFICER VINCENT HAYES.

Direct examination.

By Mr. McAuliffe:

* * * * *

Q. And what if anything did you observe about the defendant, Johnson, from the time you saw him on this street up to the box?

A. At the time he was handcuffed. He was bleeding from the side of his head. He was very excited and I assisted him to the box which was locked in Brigham Circle.

* * * * *

[Tr. 798] Cross-examination.

By Mr. Colicchio:

Q. [By Mr. Colicchio] Officer Hayes, you say you saw some blood on the defendant Johnson down near Huntington Avenue?

A. Yes, at the time, yes.

Q. And where were you at the time you saw the blood?

A. I didn't exactly notice. It was mostly in the light, against the light of the square there, the box.

Q. Down near Brigham Circle?

A. Yes, down near Brigham Circle.

Q. You saw blood where on the defendant?

A. Generally from the side of his face. I couldn't exactly say what position on his head, but it was coming from, it was all over his face.

Q. Did you observe which side of the face it was on?

A. Exactly, no. Right offhand, I couldn't exactly tell you what side of the face it exactly was on.

Q. Did you see any cuts on the defendant Johnson's face at that time?

A. At that time, I didn't notice. All I noticed, he is bleeding.

Q. And did you notice where the blood started to flow from?

[Tr. 799] A. No, I couldn't tell you where it started to flow from.

* * * * *

[Tr. 801] JAMES B. RICHARDSON.

Direct examination.

By Mr. McAuliffe:

* * * * *

Q. Were you there when the defendant Johnson was brought to the station house?

A. Yes, sir, I was.

Q. Did you observe his condition?

A. I did, sir.

Q. What did you observe about his condition?

A. I went out into the guard room——

Mr. Colicchio. I pray your Honor's judgment.

[Tr. 802] Q. What did you observe about his condition?

A. I observed a cut on the right side of his head, bleeding.

Q. Did you ask him about it?

A. I asked him about it, yes, sir.

Q. What did you ask him?

A. I asked him where he received the injury.

Q. What did he tell you?

A. He told me he was in an accident.

Q. Did he tell you what accident he was in?

A. I asked him if it was the accident between the car and the MTA bus, and he said Yes.

* * * * *

[Tr. 803] Q. Did you communicate with Dr. Laserson sometime after this?

A. I did, sir.

Q. As a result of that, did he come to the station house?

A. He did, sir.

[Tr. 804] Mr. McAuliffe. You may inquire.

Mr. Balliro. I have no questions.

Cross-examination.

Q. [By Mr. Colicchio] Would you give me the doctor's full name?

A. Dr. Joseph Laserson.

Mr. McAuliffe. He will be here if you want him.

Mr. Colicchio. He will be here?

Mr. McAuliffe. Yes.

Q. You saw some blood on the defendant Johnson when you booked him?

A. Yes, sir, I did.

Q. And as the booking officer, you, of course, look over the fellow you are booking?

A. Yes, sir.

Q. For cuts and bruises?

A. Yes, sir.

Q. And marks, is that right?

A. That is right, sir.

Q. Where was it that you observed this blood on the defendant Johnson?

A. I observed it on the right side of his head back about here [indicating].

[Tr. 805] Q. That was the side of the head?

A. Yes, sir.

Q. Was it a cut?

A. It was a cut. It was, well, I would say, about an inch, an inch and a half cut right along here. It was bleeding.

Q. It was bleeding?

A. Yes, sir.

Q. Did you observe any other cuts on the defendant Johnson?

A. No, sir, I did not.

Q. Did you observe any other bruises on the defendant Johnson at that time?

A. No, I did not, sir, just that one cut.

[Tr. 808] THOMAS M. J. DONOVAN.

Direct examination.

By Mr. McAuliffe:

* * * * *

Q. Steve McCann. Did something attract your attention in the street there?

A. No.

Q. Did you kick anything in the street?

A. Yes, a bag.

Q. A bag?

A. Yes.

Q. Did that attract your attention?

A. Yes.

Q. What did you do with it?

A. I took it and I went up the hill.

Q. You picked it up first, did you?

A. Yes.

Q. What was in it?

A. When I first picked it up I thought it was a lot of change.

Q. Keep your voice up.

A. I thought it was a lot of change, at first. We took it up the hill. I gave it to Steve. It was full of money.

Q. You gave it to Steve and what?

A. It was full of money.

Q. Full of money. And when you say it was full of money what do you mean? What was in it?

A. Ten-dollar bills, five-dollar bills, and a lot of change and ones.

* * * * *

[Tr. 820] Mr. Colicchio. Your Honor, while we are at the bench, will Dr. Laserson be here tomorrow?

[Tr. 821] Mr. McAuliffe. I will have him here. We will see he is here. You have the right to summons him. Do you intend to call him?

Mr. Colicchio. Yes. I will need him tomorrow.

Mr. McAuliffe. All right. Why don't you give the police

notice when you want him? Do you want him for the voir dire?

Mr. Colicchio. Yes.

* * * * * *

[Tr. 824] GEORGE T. INDINGARO.

Direct examination.

By Mr. McAuliffe:

Q. Your full name, sir? You have stated your full name, sir. State it for the record again.

A. George T. Indingaro.

Q. And you were the witness on the stand at the close of Court yesterday?

A. Yes, sir.

[Tr. 825] Q. Now, Mr. Indingaro, on August the 2nd, were you present in your official capacity as police stenographer when the defendant Ronald Johnson was questioned by Lieutenant Detective Donovan?

A. Yes, sir.

The Court: Let me just suggest to those who represent the press that this is not evidence that is going into the jury. They will have that in mind that the Court is hearing this on a preliminary matter, to determine whether or not the evidence will be submitted to the jury. I want that point made very clear and I want the gentlemen of the press to understand that point very clearly.

Proceed.

Q. And did you take down the questions asked of the defendant Ronald Johnson by Lieutenant Donovan in shorthand?

A. Yes, sir.

Q. And did you also take down the answers that the defendant Ronald Johnson gave to the questions asked by Lt. Donovan?

A. Yes, sir.

Q. Did you later—and were these taken down in shorthand?

A. Yes, sir.

Q. And did you later verify your shorthand notes?

[Tr. 826] A. Yes, sir.

Q. And did you still later reduce your shorthand notes to a transcript?

A. Yes, sir.

Q. And have you the transcript here?

A. Yes, sir.

Mr. McAuliffe: You have seen this?

Mr. Balliro: I haven't seen it. I understand it is not being offered against Graves any way.

Mr. McAuliffe: Do you have a copy of it? You've got a copy?

Mr. Colicchio: No.

Mr. McAuliffe: I offer this, Your Honor.

Mr. Colicchio: I am objecting to it being offered.

The Court: I'll hear you.

Mr. Colicchio: I am questioning the voluntariness of this statement?

The Court: That is why I am hearing this matter.

Mr. Colicchio: I understand, Your Honor.

The Court: This is a voir dire. The preliminary question is whether or not that you, having objected to the evidence, whether or not this statement was first given by Johnson; secondly, if so, was it given voluntarily. That is why I am listening to this matter.

[Tr. 827] Have the witness read the questions and answers so I can follow it.

A. Homicide Unit, Police Headquarters, Boston, Mass., August 2, 1963. "The following statements were made to Lieutenant Detective John J. Donovan, Homicide Unit, in the presence of Sergeant Detective Leo Gannon, Homicide Unit, Sergeant Detective Thomas Cunningham, District 16, and Stenographer George Indingaro.

"Q. (By Lieut.-Detective Donovan) My name is Lieutenant Detective John J. Donovan. I am attached to the Homicide Unit at Police Headquarters. This gentleman here is Sergeant Detective Leo Gannon. He is also a member of the Homicide Unit. This gentleman here is Sergeant Detective Thomas Cunningham. He is attached to District 16. This gentleman here is a police stenographer. His name is George Indingaro.

I am going to ask you certain questions relative to an

incident that took place on 735 Boylston Street and an incident that transpired shortly thereafter on Commonwealth Avenue at the corner of Fairfield Street. Are you willing to answer questions regarding this incident?

"A. Yes, I am.

"Q. What is your full name?

[Tr. 828] A. Ronald Lee Johnson.

A. How old are you, Ronald?

A. 29 years old.

Q. What is your date of birth?

A. January 17, 1934.

Q. Where were you born?

A. Providence, Rhode Island.

Q. Are you married or single?

A. Married.

Q. What is your wife's name?

A. Violet Johnson.

Q. What was her maiden name?

A. Violet Hazear.

Q. Where do you live?

A. 16 Devon Street

Q. With whom do you live?

A. My wife.

Q. What floor do you live on?

A. Second floor.

Q. How long have you lived there?

A. 2½ years.

Q. What is your occupation?

A. I don't have; I am not working.

Q. When you did work, what kind of work did you do?

[Tr. 829] A. Dressed poultry.

Q. How long have you been unemployed?

A. A year. I sued them.

Q. Do you own an automobile?

A. Yes.

Q. What kind of an automobile is it?

A. A '55 Buick.

Q. What model?

A. Roadmaster.

Q. And what type of a Roadmaster is it?

A. A convertible.

Q. What is the registration?

A. I don't know.
Q. In whose name is the car registered?
A. In his name.
Q. What is his name?
A. Graves.
Q. Why is it registered in his name?
A. Because I sent the insurance company a check for $70.00 and they turned around and cancelled it.
Q. Were you driving the car last night, Thursday, August 1, 1963?
A. Yes, I was.
Q. What time did you leave your house?
[Tr. 830] A. I left early.
Q. Where did you go?
A. I was up to the Savoy for a while. I picked up this girl. I don't have to give her name, do I?
Q. No. Where is the Savoy?
A. On Blue Hill Avenue.
Q. What time did you leave there?
A. About half past two.
Q. Did you go back there some time later?
A. Later on. Wait a minute, are you talking about Wednesday or Thursday?
Q. Are you talking about Wednesday night or Thursday night? I am talking about Thursday night.
A. Right.
Q. Tell me what you did?
A. I picked up Herbie.
Q. Where did you pick up Herbie?
A. At the Savoy.
Q. What is his last name?
A. Graves.
Q. Did you have your car at this time?
A. Yes, I had it.
Q. About what time did you pick up Herbie?
A. I can't remember.
[Tr. 831] Q. Was it dark?
A. Just getting dark.
Q. Did you and Herbie have some discussion about something?
A. Yes.
Q. What did you discuss?

A. Getting some money.
Q. And how did you say you would get the money?
A. We were going to rob some place.
Q. Did Herbie agree to go with you?
A. Yes.
Q. Did you have a gun with you at that time?
A. Yes.
Q. What kind of a gun was it?
A. A small one.
Q. Did Herbie see the gun?
A. Yes.
Q. At the Savoy?
A. I did not show it to him then.
Q. After this discussion did you and Herbie then leave the vicinity of the Savoy?
A. Yes.
Q. In the Buick Roadmaster Convertible?
A. Yes.
[Tr. 832] Q. Who was driving?
A. I was driving.
Q. Where was the gun at this time?
A. Under the dashboard.
Q. Was it loaded at the time?
A. Yes.
Q. How many cartridges did it have? How many bullets in the gun?
A. Three.
Q. Where did you and Herbie go then?
A. Went riding around.
Q. In what general vicinity did you ride around?
A. Oh, all around, Massachusetts Avenue. No, we did not go to Massachusetts Avenue, we went downtown, went over to Columbus Avenue, Boylston Street.
Q. Where did you go when you went to Boylston Street?
A. We stopped at the liquor store.
Q. What is the location of the liquor store?
A. I don't know.
Q. Near where?
A. Around the Prudential Center.
Q. Did you and Herbie have some discussion at that time?
A. Yes.

[Tr. 833] Q. What did you say to him and what did he say to you?

A. I said, "The place looks good."

Q. Did you have any further discussion?

A. No. We were not sure what we were going to do.

Q. What did you do then?

(No answer.)

Q. Where did you tell him to drive the car?

A. I told him to stay right there, around the corner.

Q. Did Herbie know you had a gun at this time?

A. Yes, sir.

Q. Did he see the gun?

A. Yes.

Q. So, you say you parked around the corner, around the corner from what street?

A. I guess in between Beacon and Boylston Street I am not sure. Between Commonwealth Avenue and Boylston Street. I am not sure.

Q. Is that where you got out of the car?

A. Yes.

Q. What did you do when you got to the liquor store?

[Tr. 834] A. Told the man to give me all the money.

Q. What did the man do?

A. Cooperated.

Q. How much money did you take?

A. I don't know.

Q. Did you take some money?

A. Yes. I put the money in the bag.

Q. What kind of a bag was it?

A. A paper bag.

Q. Where did you get the bag?

A. Herbie got it.

Q. Did you take the bag in the store with you or did you get the bag in the store?

A. I don't remember.

Q. Did anybody else come in the store while you were there?

A. Yes, a woman did.

Q. Did you say anything to the woman?

A. Told her to get down on the floor. "Nobody wants to hurt you."

Q. Did she get down on the floor?

A. She tried to. I said, "Never mind, stay the way you are.

Q. Did you have the gun showing at that time?

[Tr. 835] A. Told him I had the gun. I was near the door.

Q. Did the man in the liquor store see the gun?

A. Yes.

Q. Did you point the gun at him?

A. I pointed it at his legs.

Q. What did you say then?

A. Told him to put the money in the bag.

Q. Did he put the money in the bag?

A. Yes.

Q. What did you do then?

A. I told him, "Okay, stay where you are."

Q. Then what did you do?

A. I headed towards the door.

Q. Where did you turn?

A. Down Boylston Street.

Q. In which direction?

A. Going towards intown.

Q. And what did you do then?

A. I ran to the car.

Q. Did you indicate in any way where you wanted to meet him? Did you see Herbie take off in the car? When you told Herbie to take off, did he take off?

A. Yes.

Q. Now, you are on a street, where the car is parked. [Tr. 836] What direction would you go down?

A. I must have been going towards Massachusetts Avenue.

Q. Do you know what street it was? Was it a street between Commonwealth Avenue and Boylston?

A. Yes, it was.

Q. And you say you went down that street in the direction of Massachusetts Avenue?

A. Yes.

Q. Was there any one following you at the time?

A. People were running after me.

Q. Were they saying anything that you could hear?

A. They said, "Stop that man. Stop that man."

Q. Where was the money?

A. In the bag.

Q. Where was the gun in the meantime?

A. In my pocket.

Q. What were you wearing at the time when you were in the liquor store?

A. That coat.

Q. Is this the coat you were wearing at the time you were in the liquor store?

A. Yes.

Q. This is a black coat. Who does this coat belong to?

[Tr. 837] A. Me.

Q. What did you do then when you were going up the street, going towards Massachusetts Avenue, the street between Boylston Street and Commonwealth Avenue? How far up the street did you go?

A. I don't know. There was so damn much confusion.

[Tr. 838] "Q. How far up the street do you think you were?

A. A long way.

Q. Would it be a block or more than a block?

A. I don't know.

Q. Did you come to a side street eventually?

A. [No answer.]

Q. At the time you were going up this street towards Massachusetts Avenue, what was your gait, were you walking or running?

A. Walking.

Q. Then what did you do?

A. What do you mean?

Q. Did you see a police officer at any time behind you?

A. [No answer.]

Q. Did you see the car coming, the Roadmaster?

A. Yes.

Q. In what direction was the car coming?

A. It was coming down Commonwealth Avenue.

Q. What did you do when you saw the car coming down Commonwealth Avenue?

A. I went to the side and jumped in.

Q. What side did you jump in?

A. The passenger side.

[Tr. 839] "Q. Who was driving the car, who was behind the driver's wheel?

A. Herbie.

Q. Was there anyone else in the car?
A. No.
Q. What happened then?
A. A cop came around the side of the car, I looked out of the window, he passed the right side of the car and came around this side, I didn't even aim the gun.
Q. Then what did you do?
A. I had the gun out of the window like this and I just took it and shot.
Q. How many times did you shoot?
A. Shot twice.
Q. Then what happened?
A. Herbie jumped out of the car and run and I got the hell out of there.
Q. What happened to the policeman?
A. He fell down, I can't tell exactly what happened, I don't know myself until afterward.
Q. When you drove off, where did you go?
A. [No answer.]
Q. What rate of speed were you driving?
A. I don't know.
[Tr. 840] "Q. Was it a high rate of speed?
A. Sometimes.
Q. Eventually, did the police follow you?
A. They were behind me, I lost them for a while.
Q. Eventually, did something happen, did the car stop?
A. The car went out of gas when I turned the corner, then I coasted down the hill.
Q. On what street was that?
A. Coming down into Huntington Avenue.
Q. What happened when you got into Huntington Avenue?
A. I hit the bus and fell out of the car.
Q. Then what did you do with the gun?
A. The gun must have fallen out when I fell out of the car.
Q. What happened to the money?
A. The money could have fallen out at the same time.
Q. What did you do then?
A. When I fell out of the car?
Q. Yes.
A. I run.
[Tr. 841] "Q. In which direction?

A. I don't know, across Huntington Avenue.

Q. Down a side street?

A. Yes, through some alley through some barbed wire fence.

Q. Then what did you do?

A. I tried to hide.

Q. Where did you try to hide?

A. Underneath the porch.

Q. Then what happened?

A. The cops came.

Q. Did they arrest you?

A. Yes.

Q. Ronald, I am going to show you this gun here, do you recognize this gun?

A. Yes.

Q. Where do you recognize it from?

A. Looks like the one that I had.

Q. Does it look like the gun you used when you shot the officer?

A. Yes.

Q. Take a good look at it, is this the gun?

A. It is the same gun.

Q. When you got into the car on Commonwealth Avenue, [Tr. 842] did you know it was a policeman that was following you and came in front of the car?

A. He had a gun out and he was wearing a uniform.

Q. Do you have a license to carry this gun?

A. No.

Q. Has this statement you have given me been a voluntary statement?

A. Yes.

Q. Have I made any promises or threats to you?

A. No.

Q. Have you made this statement of your own free will?

A. Yes, sir."

Mr. Colicchio. May we proceed, your Honor?

The Court. The Commonwealth, I take it, offers that?

Mr. McAuliffe. I have offered it.

The Court. Nothing else at this point. He is offering the evidence through this witness.

[Tr. 843] Cross-examination.

Q. [By Mr. Colicchio] What time was this question and answering period?

A. Around 6:40 in the morning.

Q. What time did you arrive at the station?

A. I went to Station 16 about 1 o'clock in the morning.

Q. This statement that has been introduced in evidence, that was taken in Station 16?

A. No, sir.

Q. Where was it taken?

A. At Police Headquarters.

Q. What time did you arrive at Police Headquarters?

A. I arrived at Police Headquarters about 2:30 to quarter of three.

Q. Had you seen the defendant Johnson prior to the time when you took this statement?

A. Yes, sir.

Q. What time was it when you first saw him?

A. About 3 o'clock.

Q. Where was this?

A. At Police Headquarters in the line-up room, in the basement.

Q. At the time you saw him in the line-up, did you observe whether or not he had any blood on him?

[Tr. 844] A. I did not see any.

Q. After seeing him at the line-up, did you again see him before this statement was taken?

A. Would you please repeat the question?

Q. After seeing the defendant Johnson at the line-up, did you again see him before this statement was taken?

A. Oh, no.

Q. When you saw him at the time you took the statement, were you in a room at Headquarters?

A. Yes. It was one of the office rooms in the Homicide Unit at Headquarters.

Q. Was the defendant Johnson sitting down during this interrogation?

A. Yes, sir.

Q. Did he have handcuffs on?

A. I don't remember.

Q. Did you observe whether or not he had any blood on him at that time, at the time the statement was taken?

A. I did not see any.

Q. Did you observe whether or not he had any swelling of the face?

[Tr. 845] A. Not that I recall.

Q. How long did this interrogation take?

A. About 30 minutes.

Q. During that period of time, did anyone present strike the defendant Johnson?

A. Not in my presence.

Q. Did you have occasion at the time that the statement was taken to observe his head at all?

A. Well, I was in the room with him, but I didn't notice anything unusual about him.

Q. Did you observe his legs?

A. Not in particular.

Q. So that you observed nothing by way of blood on the defendant Johnson during this statement?

A. No, sir.

Mr. Colicchio. I have nothing further.

Redirect examination.

Q. [By Mr. McAuliffe] What time did you say that statement was taken?

A. I would say around ten minutes of six. I think I said ten minutes of seven.

Q. I show you this and ask you to look at it to see if it refreshes your memory as to what time it was taken. Does it?

[Tr. 846] A. Yes, I got the two——

Q. All right. Tell his Honor what time the statement was taken?

A. It was ten minutes of six.

Q. Ten minutes of six, and concluded at what time?

A. Around 6:30.

Q. I show you this coat. Was that coat the one that was shown to the defendant Johnson that he identified?

A. It was, sir.

Q. I show you this exhibit, sir. Was that——

The Court. Exhibit number?

Mr. McAuliffe. 6.

A. It was, sir.
Q. Is that the gun that was shown him?

The Court. What is your answer to that?
The Witness. Yes, sir.
Mr. McAuliffe. On the coat, your Honor, I referred to, it is A for Identification.
That is all, sir.

[Tr. 847] Recross-examination.

Q. [By Mr. Colicchio] Was there anything during the taking of this statement that was said off the record?
A. No, sir.
Q. No one in the room said anything that was not taken off the record?
A. No, sir.
Q. So, everything that was said in that room you took down?
A. Yes, sir.
Q. When did you transcribe your notes?
A. Either the day after or the second day after.
Q. Was any request made of you to transcribe them immediately?
A. No, it is not necessary.

Mr. Colicchio. I have nothing further of this witness.
The Court. You may step down.
Mr. Colicchio. The keeper of the records from the Charles Street Jail.

[There was no response.]

Mr. Colicchio. I call the defendant Ronald Johnson for the purpose of voir dire, your Honor.
[Tr. 848] Mr. McAuliffe. I didn't get what you said.
Mr. Colicchio. I call the defendant Ronald Johnson.

RONALD JOHNSON, SWORN.

Direct examination.

Q. [By Mr. Colicchio] Will you give us your name, please?

A. Ronald Johnson.

Q. Your address?

A. Well, it was 16 Devon Street.

Q. Mr. Johnson, directing your attention to August 1st, 1963, sometime that evening were you taken into custody by the police?

A. Yes, I was.

Q. And where were you when you were taken into custody?

A. Well, in the back of the yard.

Q. Where were you taken from the back of this yard?

A. Station 10.

Q. Prior to going to Station 10, were you taken to a police box?

A. No, I wasn't.

Q. How did you get down to Station 10?

The Court. Just a minute. We will take a short recess.

[Short recess.]

[Tr. 849] Q. Mr. Johnson, how were you transported down to Station 10?

A. In the station wagon.

Q. Station wagon?

A. Yes.

Q. Where did you get into the station wagon?

A. The station wagon—I guess it was pulled right up into the alleyway there. They pulled me right up in there. There was two officers in there with me.

Q. Now, on the way down to Station 10, did anything occur while you were being driven down there?

A. Well, a couple of men smacked me around a little bit.

Q. A couple of them what?

A. Smacked me around.

Q. What do you mean by smacked you around?

A. Inside the station wagon. Well, they——

Q. When you arrived at Station 10, will you tell us what happened?

A. Well, I didn't even get halfway in the door and the colored officer jumped on me and started beating on me and——

Q. Do you know the colored officer's name?

A. I don't know his name, but I identify him. I knew [Tr. 850] him when he was up here on the stand.

Q. Has he been a witness on the stand?

A. Yes, he was.

Q. What did he do?

A. He hauled off and hit me twice in my jaw.

Q. And this was when you first arrived at Station 10?

A. Yes. I didn't even hardly get in the door when I was grabbed.

Q. What happened after that?

A. Then some more officers come and started clubbing me.

Q. Where did this take place?

A. Right at Station 10.

Q. Where in Station 10?

A. Inside there before you get to the booking desk.

Q. What did these officers do?

A. Well, some of them took their club and some of them what they call, I guess, slap sticks with the lead in them.

Q. And did they strike you with it?

A. They hit all across my body and my face.

Q. All right. Then, sometime you were taken to the booking desk?

[Tr. 851] A. Yes, I was.

Q. Did anything occur at the booking desk?

A. Well, as you get to the booking desk, there was a cameraman right directly in front of me. I was facing him. And I asked him, I said, "Did you see that?" He says, "No, I didn't see a thing."

Q. After being booked, where were you taken?

A. I was taken to a cell.

Q. At the cell, did anything occur?

A. Yes, it did.

Q. What occurred there?

A. Well, one of the officers opened the door and they let two officers in and the others, there was five, there was a whole lot of officers out there, but two or three of them had

went inside and the other ones stood outside, and they started beating me again.

Q. Do you know who these officers are?

A. I couldn't identify them, no.

Q. What did they do?

A. Well, they started, when they came in the door, they started beating me all over my stomach. They had me pinned up against, there is a slab there, they had me pinned up against that. I couldn't bend my knees. They started beating me on my stomach. [Tr. 852]

Q. How long was it that this took place?

A. Gee, I would say about five minutes, because they come out of there. One of them hollered, "The newspapermen are out there," and they were trying to get to the back. They wanted more pictures of me.

Q. What happened after that?

A. Well, they left the cell, and some more officers came down but they didn't come in. They just stood outside looking me over.

Q. Sometime later, were you taken from the cell?

A. Well, it was quite a while, I say about an hour.

Q. About an hour? You remained in the cell for how long?

A. I would say about an hour, somewhere in there.

Q. When you were taken out of the cell, where were you taken to?

A. I was taken, I was brought back out so they could take more pictures of me.

Mr. McAuliffe. I didn't get the answer.

The Court. Read that, Miss Kevill.

[Tr. 853] [Answer is read by the stenographer.]

Q. Were the police taking pictures of you?

A. I don't know who they were. They had cameras.

Q. Did anything occur at this time after that was done? Then where did you go?

A. They brought me back to the cell.

Q. How long did you remain in the cell?

A. About ten minutes. Then they said they wanted more pictures.

Q. You were taken back out?

A. Yes, I was.

Q. Well, how long were you out from the cell at this time?

A. Oh, it was long enough, long enough for them to get the pictures they wanted.

Q. Then where were you taken?

A. Back to the cell.

Q. How long did you remain in the cell this time?

A. Gee, I don't know the time. I don't know the exact time it was.

Q. Did anything occur at this time in the cell?

A. No. Nobody came in the cell at that time, right at then.

Q. Sometime were you taken from the cell again?

[Tr. 854] A. Yes, I was.

Q. Where were you taken to?

A. Down to Headquarters.

Q. That's Police Headquarters?

A. Yes.

Q. And do you recall about what time it was that you were taken down to Police Headquarters?

A. I don't.

Q. When you arrived at Police Headquarters, where were you taken to in Police Headquarters?

A. Well, the side door, as you come in the side door, there is a door off to the left. They got a teletype machine in there. I was——

Q. Were you taken into the room?

A. Yes, I was taken in there.

Q. Who was present at that time?

A. Must have been about sixteen plainclothesmen.

Q. Do you know any of the officers that were present?

A. I know one of them.

Q. What is his name?

A. I don't know his name, but I know his face.

Q. Will you tell us what happened after you arrived at Police Headquarters?

A. Well, they put me inside this room, and there is about [Tr. 855] 16 or maybe more officers in the room. And this one tall one, he is out of Headquarters, he stood at the door because one of them said, "There is a lot of newspapermen out there who want to take pictures. Make sure none of them come around."

So, they took me and pinned me at the top of the teletype

machine and just started beating me.

Q. When you say they stood you at the teletype machine, what did they do?

A. They got coat hanger wires.

Mr. McAuliffe. They got——

The Witness. Coat hangers, coat hangers.

Q. What did they do with the coat hangers?

A. They started beating me with them.

Q. Where, what part of the body?

A. All across my body, I would say from here down.

Q. What else occurred?

A. They had these, what they call noggin knockers, that's what they are referred to. I don't know the exact name of them.

Q. What happened with respect to them?

A. They started beating me in my ribs.

[Tr. 856] Q. Then what occurred?

A. Well, they said, "Bring him back out again." They brought me out and brought me out on a line-up.

Q. At this time, were you bleeding at all?

A. Yes, I was.

Q. From where were you bleeding?

A. I know I was bleeding from the mouth. Blood was dripping off on the floor. Blood was dripping off on the floor from my head. I had a lot of knots on my head. I couldn't——

Q. All right. You were taken out to the line-up?

A. Yes.

Q. And how long did you remain in the line-up at that time?

A. I guess about 15 minutes.

Q. After the line-up, where were you taken to?

A. Right back into the room.

Q. What occurred at that time?

A. They started beating me in my head. They tried to get to my testicles, but I tried to bring my feet together to cover them.

Q. What happened?

A. Well, one of them said, he says something, "You are [Tr. 857] a wise guy," or something to that effect. So, I

mean, that was all, you know, instinct. I just tried to cover myself.

Q. All right. What happened after that?

A. Well, they took the clubs that they had and started jabbing them this way in my ribs.

[Tr. 858] Q. At any time were you hit on the head?

A. Yes, I was. I was hit on the head seven or eight times. I told them, "I don't think I can take it any more."

Q. And then what happened?

A. He said, "You'll take it or else."

Q. What happened next?

A. Well, one of them came, knocked on the door, and the big, tall fellow that was standing on the door at the inside, he opened it up and said, "Bring him back out again." So, they brought me back out again and I went before the lineup.

Q. And how long did you remain at the lineup?

A. About ten minutes.

Q. And after the lineup where were you taken to?

A. They brought me to a cell. And the big, tall fellow, the officer came in the cell. The cell was open. He brought me in there and he started asking me questions.

Q. And did anything occur?

A. No. He didn't put his hands on me.

Q. How long did you stay in the cell?

A. Not too long. They brought me out of there and back into that room again.

Q. When you were brought back into the room this time, what occurred?

[Tr. 859] A. They started beating me again.

Q. With what?

A. Clubs, slapsticks.

Q. And where were they beating you?

A. On my face, on my body.

Q. And for how long were you in the room at this time?

A. I'd say it wasn't too long. I'd say about average of ten minutes.

Q. During this occasion were you conscious at all times?

A. I don't know. I don't know. I was in a daze.

Q. All right. And then what happened?

A. They dragged me back up on the lineup, but I couldn't go up there on my own will. They had to help me up there. I know that for a fact.

Q. They helped you out to the lineup?

A. Yes.

Q. And how long did you remain in the lineup at this time?

A. Somebody hollered, "That's the last batch." The people came in and they looked me over and they went back out again.

Q. Were you bleeding at this time?

A. Yes, I was.

Q. And from where were you bleeding?

A. From my mouth, my legs, my knee, my ankle and——

[Tr. 860] Q. Was you head bleeding at all?

A. Yes, my head was opened up.

Q. All right then. After this lineup where did you go?

A. They took me upstairs in the elevator.

Q. And what occurred?

A. One officer that had me—well, there was three of them. There was two on each side of me. I was handcuffed and one of them walked over towards the door; and he went inside and there is a little short fellow with grey hair. He came out. Then they brought me in. And they told me to sit down. No sooner I sat down one of the officers started rabbit punching me on the back of my neck, over here.

Q. And then what happened? Were you bleeding at this time?

A. Yes. I was bleeding all through that time. I didn't get nothing. And the other one was standing over there, sitting over there at the desk on my right. And the taller one, not the one that was at the table, the other taller one, I guess from Homicide, he was sitting over to my left, almost directly in front of me. The other one started beating on me. And he said, "Come on. You might as well confess that you did it." I said, "Confess what?" Then the other one got started. He went over in the drawer and got something. [Tr. 861] I don't know what it was. It was like a powdered form. It looked like salt or sugar. And that is when I was called all kinds of names, out of my name. And he stood in back of me. Well, the other one went over, sat down behind the desk and he got a little piece of paper and he poured it in the open cut on my head. And then, at that time, I hollered. And I know for a fact, after that that it was salt because I reached down and I tasted a little bit. So then, the

one that was sitting behind the desk, he came up and he had a chair. It had wheels on it like that, and he bore this chair right up between my legs. In other words, when he brought his chair up he had opened up his legs right in between mine to hold them open. And he says, "You ain't going to tell us anything, are you?" I said, "Tell you what?" He took his hands and reached down and grabbed me by my testicles and squeezed them.

Q. What did you do at this time?

A. I told him, "I can't take it. I can't take it." He said, "You'll take it or else." At that time, I don't know. I can't remember too much from that. I guess I must have passed out.

Q. What happened next?

[Tr. 862] A. Well, the other fellow, the one that was the officer that was standing off to my left, he was sitting down. He has never put his hands on me. But he had these things, as I come to, I smelled it in my nose. I guess it had ammonia. It smelled like it.

Q. It what?

A. It had ammonia like, these capsules. He broke them and put them on my nose.

Q. Had you been conscious at this time?

A. At some times I was conscious and some times I wasn't. And they told me to stand up. This is after they got through squeezing my testicles. So I stood up and they told me to hold my hands up, take my hands. They had cuffs on them, and hold them up over my head. Well, I didn't do it, so the officer that was in back of me, when I did bring my hands up, he grabbed them and then two of them started beating me in my stomach. So I told them, "I got to go to the bathroom." He said, "What have you got to do?" I said, "I don't feel good." So he says, "If you puke up on me—At the time I guess I was trying to heave. He said, "If you puke up on me, I'm going to clobber you."

I couldn't hold it. I let go. And I puked up on him. Then he said, "Take him out." They took me out and to the [Tr. 863] lavatory; and I couldn't get nothing up. They brought me back, sat me down in the chair; and they went on, proceeding. First they brought me back, two of them went out and the other fellow, sitting there in the chair, the other two went out. And then about five minutes they come

back again. And the fellow sitting in the chair gave me some pills. I don't know what they were, but I know they were pills; and I wouldn't take them. They took my mouth and they squeezed it like that, put it on my tongue and gave me some water.

When they came back, the other fellow grabbed me by my testicles the first time, started the same thing over again.

Q. Were they asking you questions at this time?

A. At the same time they were asking me everything that happened about this cop being shot.

Q. What did you tell them?

A. I told them I didn't know nothing about it.

Q. Then what happened?

A. They said, "You were driving the car." I said, "Yes, I was driving the car after everything had happened." I didn't know what had happened. So, he says, he says, "Why is the car registered in Graves' name?" I said, "I had a [Tr. 864] little trouble with the Aetna Acceptance, and I sent them a check for seventy dollars and twenty cents and they promised to reinstate me; and they didn't. They cancelled me. I couldn't register the car in my wife's name because it couldn't be anybody in the house. So I registered it in Graves' name."

So at the same time they were beating me and clobbering me, repeating everything over again. So just when he came up and squeezed my testicles and I just went along with them. I couldn't do anything else but.

Q. Some time after you say that he was squeezing your testicles did a stenographer come into the room?

A. No, not at the time he was squeezing my testicles.

Q. Some time after that?

A. After that the stenographer came.

Q. How long after that was it the stenographer came in?

A. The officer told me the same story, "The same story I told you, you repeat it when the stenographer comes in." I said, "What do you mean?" He said, "The same thing I told you now, I want it all repeated. You say it when the stenographer comes in." I told him——

Q. How long after that was it that the stenographer came in?

[Tr. 865] A. It was about five, about five minutes.

Q. Now, when the stenographer was there, how did you feel?

A. Well, the fellow that was sitting on the side, over here, he kept that stuff in my nose, kept the stuff in my nose. I was all messed up.

Q. Were you bleeding at all at this time?

A. Yes, I was.

Q. And from where were you bleeding?

A. From my head, right here, my mouth, my knees, my thighs.

Q. Now, during this period of time, from the time that you were taken into custody up until the time that you saw this stenographer, had you seen the doctor?

A. No, I didn't.

Q. Was there a doctor that looked at you at Station 10?

A. No.

The Court: Let me have that question and answer, please.

(Last question and answer read by the stenographer.)

Q. Do you recall a doctor examining you at Station 10?

A. There is no doctor that came in there. I tell you there was one fellow came in. I don't know whether he was a detective or a cop off duty. He just looked through the bars and that was it.

[Tr. 866] Q. At some time at Station 10, wasn't there a doctor that examined you, looked at you?

A. No, no, it was not.

Q. At some time after your arrest you were taken to Charles Street jail, is that right?

A. Yes, I was.

Q. Do you recall how long after you were arrested you were taken to Charles Street jail?

A. Right after I went to Court the next morning.

Q. After the next morning?

A. Well, the next morning. They had me. After everything I was passed out on the floor. I don't even remember going downstairs in the headquarters. But I remember going to Court.

Q. Some time after leaving headquarters did you go over to Station 16?

A. Yes, I did.

Q. Do you remember about what time of day it was that you went to Station 16?

A. I'd say about seven or eight in the morning, about 7.00 or 8.00 in the morning.

Q. And will you tell us what happened when you arrived at Station 16?

A. Well, the officer that was driving the station—the [Tr. 867] vehicle that we was in, he pulled up outside and another officer came down and told him, because he was going to leave the station wagon, the truck that they bring you in, he was going to leave it on the side, to bring it inside. "We have a reception committee waiting for him." So, he took the truck and backed it up on the inside and took us out. And when we got out there were cops lined up on each side of the wall at Station 16.

Q. What happened?

A. They started beating us like it was no tomorrow.

Mr. McAuliffe: I didn't get the answer.

The Court: You may repeat it, Mrs. Nurse.

(Last answer read by the reporter.)

Q. Can you describe what happened to you during this beating?

A. Well, I didn't even want to come out the wagon. I didn't want to come out the wagon. I knew what was going on. They dragged me out. They took their clubs and some of them had the butts of their pistols and they started beating me on the head.

Mr. McAuliffe: I object, Your Honor. I take it this was all after a statement was given. I object.

Mr. Colicchio: Well, I will withdraw that.

[Tr. 868] Mr. McAuliffe: I ask it all be stricken.

The Court: You withdraw it, you say?

Mr. Colicchio: Yes, I will withdraw it, Your Honor.

Q. Now, at some time while you were at Charles Street jail, were you taken to the Boston City Hospital?

A. Yes, I was.

Q. Do you recall how long you had been at Charles Street jail before you were taken to Boston City Hospital?

A. About a week, a little over a week.

Q. Were you having some complaints while you were at the jail?

A. Yes, I was.

Q. What was bothering you?

A. Well, I had headaches. I never had them before like that. They were like migraines. And I was puking. I couldn't hold my food in my stomach.

Q. Was there anything else bothering you at the time?

A. My ankle, my knees, my side over here and the main thing was my head, the headaches I had.

Q. Now, when you were taken to the Boston City Hospital did you receive some treatment there?

A. Yes, I did. The officers over at Charles Street brought me down there and the doctor examined me. And through [Tr. 869] the examination he knew that there was something wrong with me; and he wanted to take and, I guess do what they call a dye test, shoot dye into my vein, that travels to my head and find out where the clots are. And they wanted to do that. But the officers that was there told them, he told them that I would have to stay. He said, "No." We can't keep him. Sheriff Sullivan would have something to say about that. The doctor said, "Look, the man is sick. The man is going to have to stay here." Then they went on and went downstairs. After they made their phone call to let them know that I wouldn't be back. Like I say, they performed the operation.

I remember them sticking a needle into my vein here.

Q. Some time, while you were there an operation was performed on you?

A. Yes.

Q. On what part of your body?

A. My head.

Q. How long did you remain at the Boston City Hospital?

A. Gee, I don't know. It's about six—I don't know exactly how many days, how many weeks it was.

[Tr. 870] Q. Well, when you left the Boston City Hospital where did you go to?

A. I went to Norfolk Colony Hospital.

Q. And you remember how long you stayed there?

A. Oh, about seven or eight weeks.

Q. This statement that's been introduced in evidence——

The Court: No. Which was offered by the Commonwealth. The Court has not ruled on this yet.

Mr. Colicchio: Yes, I'm sorry.

Q. Which has been offered by the Commonwealth, did you voluntarily make that statement to the police?

A. No, I did not.

Q. What caused you to make that statement to the police?

A. When they grabbed me by my testicles I had to come across.

Mr. Colicchio: You may inquire.

Cross-examination.

By Mr. McAuliffe:

Q. As I understand it, Mr. Johnson, you were continually beaten over a period of hours, is that right?

A. That's right.

Q. Answer so we'll know.

A. Yes, that's right.

Q. And you were beaten with clubs?

A. I was beaten with some clubs and slapsticks.

[Tr. 871] Q. And what else?

A. Slapsticks.

Q. Slapsticks?

A. Yes, that is what they call them.

Q. What are they?

A. I don't know what they are made of.

Q. Describe it.

A. Actually it looks like a big spoon, but it is made of lead.

Q. A big spoon, made of lead?

A. It's of lead in the inside.

Q. That is what you call a slapstick?

A. Yes.

Q. Name one officer that had one.

A. Name one? I couldn't. They had so many in the room.

Q. You didn't know the names of any officer?

A. I knew the ones that beat me upstairs.

Q. Where was this, upstairs where?

A. In the room.

Q. What room are you talking about? At headquarters?

A. At headquarters.
Q. Do you know the names of those men?
A. I know what they look like. I can point them out.
Q. You just said, you knew their names, the men at head-
[Tr. 872] quarters, upstairs, that beat you, is that right?
A. The names are right on the testimony.
Q. Their names are here, are they?
A. The names are right on the testimony there.
Q. Which testimony?
A. The testimony that they got from me.
Q. Which was read here this morning?
A. Yes.
Q. Lieutenant Donovan.
A. That is one of them.
Q. He is one of them?
A. That's right.
Q. What did he do to you?
A. He is the one that beat me in my stomach.
Q. He beat you in your stomach, is that right?
A. Yes.
Q. Where were you when he beat you? Where were you then? At Headquarters?
A. This is upstairs. They didn't touch me downstairs.
Q. This is upstairs at headquarters?
A. That's right.
Q. Is Lieutenant Donovan the man that questioned you and he was the man that beat you in the stomach?

The Court. What's your answer?

[Tr. 873] A. Yes.
Q. How did he beat you in the stomach? What way?
A. With his fists.
Q. All right. Anything else that he did to you?
A. One of them, I don't know which one it was, they took salt and poured on my head.
Q. That was at headquarters upstairs?
A. That was at headquarters upstairs, yes.
Q. Can you tell us who that was?
A. That was Mac something.
Q. McCready?
A. I don't know exactly which name.
Q. Pardon?

A. I don't know exactly which name that it would be, but I know him. He is the one that took the belt from my wife down at Station 16. He had a belt in his hand. It was in the paper.

Q. He had a what?

A. He had a belt or something similar to a belt, or something. And he was talking to my wife at Station 16. He was the one that came with the officers to headquarters from 16.

Q. What did he do to you?

A. He held my hands up over my head.

[Tr. 874] Q. What else?

A. When I first came in the room he automatically started beating me on my neck.

Q. He automatically started beating you on your neck?

A. That's right.

Q. And you're talking about the room upstairs in headquarters?

A. That's right.

Q. Was this before or after Lt. Donovan beat you in the stomach, if you remember?

A. What do you mean? Before what?

Q. Lt. Donovan beat you, you say. Lieutenant Donovan beat you in the stomach?

A. Yes. There was three or four of them in the office, in the room.

Q. Well, take the fellow that held your hands up over your head, is that right? Is that what you just told us. Other than that what did he do?

A. While the other one beat me my hands were cuffed. They made me hold my hands up like that so I wouldn't bring them down.

Q. One man held your hands up over your head, with the cuffs?

A. This man was in back of me. This man that took the [Tr. 875] belt from my wife was in back of me. The other one I guess his name was Donovan, Officer Donovan, told me to bring my hands up.

Q. Have you finished your answer?

A. Yes, well, yes.

Q. Have you?

A. Yes. That's all right.

Q. One of them had a belt from your wife?

A. I said, according to the paper.

Q. What paper?

A. Well, the Boston Record, the picture was right on the front page, talking to my wife. My wife's picture was on it.

Q. The police officer's picture was there?

A. The police officer's picture was on it.

Q. What did he do to you?

A. I say he was in back of me, holding my hands up like this.

Q. Has your lawyer got the picture of the American, showing the picture of your wife?

A. I don't know.

Mr. McAuliffe: I call for it.

Q. Is this the officer you refer to?

A. Yes, he was up there.

[Tr. 876] Q. Wait a minute. He was there, but what did he do to you?

A. I told you he was in back of me. He was in the room all the time. He was in back of me.

Q. I asked you what he did to you. What did he do to you?

A. He held my hands up and——

Q. And they were cuffed?

A. My hands were cuffed.

Q. And he held your hands up and then somebody beat you?

A. That's right, in my stomach.

Q. Who was the officer that beat you?

A. I don't know his name, but I know him if I see him.

Q. Is this his picture?

A. No. I haven't seen his picture in the paper.

Q. And according to this it was Detective Emmet McNamara, is that right?

A. Yes. He is the one that made me hold my hands up over my head, yes.

Q. All right. Was this before you gave the statement or after you gave the statement?

A. All this is before.

Q. All this was before?

A. All this was before.

Q. Now, anybody else, any other officer whose name you

[Tr. 877] can give us, to help us, to look into this, that beat you?

A. There was three officers in the room. That one was one of them. There was actually, there was four, but the one on the side he didn't bother me. He didn't put his hands on me. I don't know his hands.

Q. This man, Detective McNamara was there?

A. He was there.

The Court: And Donovan?

Q. And Lieutenant Donovan?

A. Mm, mm.

Q. Is that right?

A. Everybody's name that is on that.

Q. Wait a minute, please.

A. O. K.

Q. McNamara, Donovan, a man at your side that didn't do anything. What's his name?

A. I don't know his name.

Q. Was he a white officer or colored?

A. No, he was white.

Q. There was a fourth officer?

A. Including this one here there was four.

Q. You have told us about McNamara in back of you. Donovan was there. The man at the side. Who was the [Tr. 878] fourth?

A. There's another one, the one that squeezed my testicles.

Q. He was in the room at that time squeezing your testicles, you say?

A. That's right.

Q. In the presence of McNamara, Donovan, and the man you don't know?

A. That's right.

Q. And this was at headquarters?

A. At headquarters.

Q. And this was upstairs?

A. That's right.

Q. Was this before or after you were in the lineup?

A. This is after I was in the lineup.

Q. After you were in the lineup, have you heard his name mentioned in Court here?

A. Well, most of them got the name——

Q. Have you heard the name of that man mentioned who squeezed your testicles, in Court here?

A. No. In fact I haven't even seen him in here.

Q. But you said his name is here?

A. His name was on the testimony when the stenographer read off the testimony. His name was supposed to have been on it.

[Tr. 879] Q. His name was on it. Did you hear his name read here this morning?

A. I don't know whether it's his name or not. I know his name is supposed to be on that testimony. I surely could identify him if I saw him.

Q. Well, look this over now and see if his name appears there.

A. This John J. Donovan. I am pretty sure all these signatures that are on here are the men that was in that room at the time.

Q. All right. Well, who are they? Who was the man that squeezed you?

A. You've got a lot of Donovan's on the police department, but I can identify the man if I saw his face.

Mr. McAuliffe: Ask Lieutenant Donovan to step in here, please.

Step up here, Lieutenant.

A. No, that is not him.

Q. He is not the man?

A. No.

Q. But you just told us Lieutenant Donovan, that man that questioned you, is the man that beat you in the stomach?

A. That is not the man.

[Tr. 880] Q. Did he beat you?

A. I can't recollect his face.

The Court: Have him come forward.

Mr. McAuliffe: Step right up so you can get a good look at him.

A. No, that is not him. I am pretty sure he was—I don't know unless he gained some weight.

Q. Pardon?

A. Unless he gained some weight between now and the

time, but he resembles the man that was up there in that room.

Q. He is the man that questioned you?

A. I say he resembles the man.

Q. That was in the room?

A. That was in the room.

Q. The man that questioned you and asked you questions, did that same man beat you?

A. It was——

Q. I am just asking you about the man that questioned you, when the stenographer was present. You saw the stenographer taking down the questions asked of you and the answers you gave, didn't you?

A. Yes.

Q. He questioned you, didn't he?

[Tr. 881] A. I say the man resembles him.

Q. He resembles the man who questioned you?

A. That's right.

Q. Did the man who questioned you beat you?

A. Everybody in that room beat me.

Q. All right, sir. So that the man that questioned you and you gave this statement to, and you told your lawyer in the Court the statement was not given voluntarily, is that right?

A. That's right.

Q. This is the statement you referred to?

A. Well, I guess it is.

Q. Look it over and see if there is any doubt in your mind?

A. I never looked at the statement in the first place when I was taken down.

The Court: We'll take a recess while he reads it.

(Recess, 11:25 a.m.)

[Tr. 882] [The Court came in 11:42 A.M.; all parties except jury present.]

Cross-examination.

Q. [By Mr. McAuliffe] Well, have you read over the statement that——

A. Yes, I have.

Q. —that your lawyer gave to you?

A. Yes, I have.

Q. Did you talk about what you were going to testify about today with anyone before court opened this morning?

A. I don't understand what you mean.

Q. Before you were brought up to court this morning, did you talk with anyone downstairs in the dock about what you were going to testify to?

Mr. Colicchio: I pray your Honor's judgment.

The Court: He may answer.

A. No, I just talked to my attorney.

Q. You talked to your attorney?

A. That's right.

Q. Did you talk with him about what you were to testify to?

A. No, not in particular.

[Tr. 883] Q. I see. Not in particular?

A. No.

Q. You knew you were going to testify?

A. I knew I was going to be on the stand.

Q. Yes, and you knew that in order to keep the statement out of evidence, you had to tell a story about being beaten; you knew that, didn't you?

A. No, I didn't.

Q. You didn't know that?

A. What do you mean, the fact that I was beaten?

Q. Did you understand my question?

A. Well, no. Repeat it again.

Q. Certainly. You knew that in order to prevent this statement from going into evidence, you would have to tell a story about being beaten, and that's the reason you gave the statement; didn't you know that?

A. No, it is not.

Q. You didn't know that?

A. No, I didn't.

Q. Do you know it now?

A. Well, I know that, well, I figured I got up here to tell the truth. That's what I am doing.

Q. That is not answering my question. Did you know that? Do you know it now?

[Tr. 884] A. I know it now.

Q. When did you find it out?

A. What do you mean, when did I find it out?

Q. Just what I say, you know now. When did you find that out?

A. I knew that before.

Q. You knew that before, I see. By before, you mean when did you know that?

A. Well, the fact that I was beat? I mean, that's a known fact.

Q. That's a known fact. You were well aware of that?

A. Yes.

Q. You didn't have to be told about that, is that right?

A. That is right.

Q. Now, having read over the statement—have you read it over?

A. That's right.

Q. What do you say about Lieutenant Donovan now, the man that stood before you?

A. The people that was in that room I cannot make no positive identification of them.

Q. And you know, don't you, if you make any identification, those witnesses can be brought in here to testify? Isn't [Tr. 885] that right?

Mr. Colicchio: I pray your Honor's judgment.

The Court: He may answer.

Mr. Colicchio: Note my exception.

Exception No. 56.

Q. Did you know that?

A. Did I know what, that they could be in here?

Mr. McAuliffe: Read the question to him, please?

The Court: You may.

[Question is read by the stenographer.]

A. No, I don't.

Q. You don't know that?

A. No.

Q. Well, we would like to get at the bottom of this, Mr. Johnson, and we would like you to help us and tell us the name of any officer, or the description of any officer, that either beat you or was present when you were beaten either at Station 10 or Police Headquarters. Now, see if you can give us some names?

A. At Station 10, I know for a fact that the colored fellow was up on the stand, the officer, he was one.

[Tr. 886] Q. That's Officer Hayes?

A. If that's his name.

Q. Well, did he testify here?

A. The fellow that was up on the stand.

Q. What name did he give when he testified.

A. I can't remember.

Q. You can't remember?

A. I know his face, his face is in the picture.

Mr. McAuliffe: Officer Hayes. I ask him to step in, please. Right up here, sir.

The Witness: That's him.

Q. That's the officer?

Mr. McAuliffe: Stay there.

A. That's right.

Q. This officer here?

A. That's right.

Q. What did he do?

Mr. Colicchio: I pray your Honor's judgment.

The Court: To what?

Mr. Colicchio: I see no purpose for this witness now being in the court room.

The Court: He has identified him, yes. Under the rule of the sequestration of the witnesses, he may be withdrawn. He may step outside.

[Tr. 887] Mr. McAuliffe: One question and we won't go into that, your Honor.

Q. He is the officer you spoke about when your attorney was examining you, is that right, Yes or No?

A. When my attorney was examining me?

Q. When your attorney was asking you questions, he is one of the officers——

A. That's right.

Q. —you mentioned?

A. That's right. That's right, right there.

Q. And he is the one who you told me you didn't know his name, you didn't remember his name?

A. I didn't remember his name, but I know him. I seen his pictures in the paper.

Mr. McAuliffe: All right. Step out.

Q. Now is there any other officer that you can help us on?

A. The one that's in the—the one in the paper with my wife.

Q. We have identified him as Mr. McNamara?

A. That's right, he was there.

Q. And he was there while you were being questioned, is that right?

A. That's right.

Q. What other officers at Division 10 did you tell his Honor and the jury beat you?

A. Well, for that I cannot remember their names because there were so many of them around. I do remember that [Tr. 888] fellow there because he jumped on me before I even got halfway in the door and started punching.

Q. Do you remember his name?

A. I didn't remember his name. I said I knew what he looked like.

Q. Well, now, you saw Lieutenant Richardson on the stand yesterday?

A. Which one was that?

Q. Did you see a man who testified his name was Lieutenant Richardson and talked to you at Division 10 on the night of August 1st?

A. The one that supposed to be behind the cage?

Q. The man that testified yesterday, gave his name as Lieutenant Richardson; did you see him here yesterday?

A. There have been a lot of officers here.

Mr. McAuliffe: Bring in Lieutenant Richardson, please.

The Witness: No, I cannot remember the man. I cannot remember that man's face as hitting me.

Q. You can't remember his face?

A. As hitting me, no.

Q. Do you recall seeing him there?

A. No, I don't.

Q. You don't recall seeing him at Division 10?

A. No, I don't. That place was loaded with cops.

[Tr. 889] Q. But you don't recall seeing this man there?

A. No.

Mr. McAuliffe: Step out, please, Lieutenant Richardson? Thank you.

Q. Do you know Officer Craigwell?
A. Yes, I do.
Q. You know him?
A. Yes, I do.
Q. Was he at Station 10?
A. He was.
Q. What about him? Did he abuse you in any way?
A. No, he didn't.
Q. He didn't?
A. No, he didn't.
Q. Now you know the officer I am talking about?
A. Craigwell, yes, I do. I know him very well.
Q. You know him very well?
A. That's right.
Q. Did he talk to you while you were in the cell?
A. Yes, he did.
Q. And was he present at any time while any officer beat you or abused you?
A. He came, as I remember, he came, Officer Craigwell came in after I was at the booking desk. He told me to—he told me to take it easy, or something to that effect.
Q. He told you to take it easy?
A. Yes.
Q. You were using some very strong language toward the police, isn't that right?
[Tr. 890] A. No, I wasn't using strong language, not as far as I was concerned.
Q. You didn't consider it strong language, right?
A. No, because I was attacked when I got in the car.
Q. As a matter of fact, you were using very profane language to Officer Hayes and other officers there, weren't you?
A. No, not that I can remember, no.
Q. There were camera there that you saw?
A. Yes.
Q. And they were grinding away as to what was taking place at the booking desk, isn't that right?

A. I didn't see no cameras. I saw cameramen with them flashbulb camera.

Q. Did you see any microphone put over to where you were talking to the officer that was booking you?

A. No, I didn't.

Q. You what?

A. No, I didn't.

Q. You didn't. All right. Well, any other officer whose name you can give to his Honor that abused you?

A. Well, he was there but he didn't put his hands on me, the officer from Station 9.

Q. This Lieutenant Ingenere, he was there?

A. Yes, he was there.

Q. He didn't abuse you in any way?

A. No. He came down to the——

[Tr. 891] Q. All right, he didn't. Was he present when any officer abused you?

A. No, not that I can remember.

Q. Not that you can remember?

A. No.

Q. Did you see Mr. Schofield there?

A. No.

Q. At any time that evening?

A. I cannot remember. The place was so full of officers I can't remember them all.

Q. Where do you claim you were beaten in Division 10?

A. I was beaten in front of the booking desk.

Q. In front of the booking desk?

A. Before I even got into the door.

Q. With cameramen all there with their cameras, is that right?

A. That's right. That's right.

Q. And all taking pictures of it?

A. Well, they didn't get pictures of that.

Q. They didn't get that?

A. That's right. They didn't want them.

Q. There were men there with cameras while you were beaten in front of the desk, is that right?

A. That's right.

Q. How many cameras were there, would you say?

A. I can't say how many cameras were there. I know

when I got up to the booking desk, directly in front of me there was a cameraman.

[Tr. 892] Q. Well, now, I also understood you told his Honor that no doctor treated you at Division 10?

A. No. Well, I am sorry about that. I do remember.

Q. You do remember that now?

A. I do remember a doctor coming in there.

Q. How did you happen to forget it before the recess?

Mr. Colicchio: I pray your Honor's judgment.

The Court: No. He has testified both ways and he may be called upon for an explanation if he can offer it.

Mr. Colicchio: Please note my exception.

Exception No. 57.

The Court: He may offer it concerning a change in memory.

A. No, when I was in the cell, the doctor, like I say, a man came in, he came in just like you would be dressed. He did not come in the cell. He told me to take off my clothes. He told me to take off my clothes.

Q. Yes?

A. And I took them off.

Q. You didn't know he was a doctor?

A. I did not know he was a doctor.

Q. You didn't?

A. No.

Q. He didn't tell you he was a doctor?

A. No, he didn't.

Q. When did you find out he was a doctor?

[Tr. 893] A. I didn't exactly know he was a doctor until I remember he told me to take off my clothes.

Q. So you did know he was a doctor that night?

A. No, to a fact, I didn't.

Q. Didn't you just tell his Honor you didn't know he was a doctor until he asked you to take off your clothes?

A. I said I remember that a man told me to take off my clothes and I stripped down to my underwear.

Q. Well, you told his Honor, while your lawyer was asking you questions, that you stripped down to your underclothes, isn't that right?

A. My lawyer asked me. I didn't say I was stripping down to my clothes.

Q. You didn't tell his Honor this morning that you were stripped down, you stripped off your clothes?

A. Not that I can remember. This doctor or whatever he is supposed to be told me to take off my clothes. He did not come in the cell. And I took them all off.

Q. Well, you said this morning when your lawyer was asking you questions that no doctor examined you, right?

A. I said a man had came in.

Q. No, you said no doctor examined you at Division 10, is that right?

A. Well, he didn't describe himself as a doctor.

[Tr. 894] Q. And your lawyer asked you several several questions as to whether or not a doctor examined you or treated you at Division 10, didn't he, this morning?

A. I assume he did.

Q. You assume he did. Don't you recall the questions that your lawyer asked you this morning?

A. I remember my lawyer asking was I treated by a doctor and I said No.

Q. You said No, you were not treated by any doctor at Division 10?

A. I said No.

Q. Is that right?

A. He did not put nothing on me. He just looked me over. I took off my clothes and he looked me over.

Q. What reason do you give for denying this morning that a doctor examined you or looked you over at Division 10?

Mr. Colicchio: I object, if it please your Honor.

The Court: He may answer.

Mr. Colicchio: Note my exception.

Exception No. 58.

The Court: Do you contend he did not deny it?

Mr. Colicchio: I contend he has already answered the question.

The Court: He may offer an explanation if he has an explanation.

[Tr. 895] Mr. Colicchio. I believe he has, your Honor. That is the objection.

The Court. Well, if so, it doesn't lie too clearly in my memory, but you may have the question.

A. Say it again, please.

Mr. McAuliffe. Read the question.

The Court. You may.

[Question is read by the stenographer.]

A. Because I didn't realize that he was a doctor at the time. I knew, like I said, I knew a man had came in there but he did not, he did not treat me. He looked me over.

Q. All right. This morning when you said no doctor examined you, it is because you didn't realize he was a doctor?

A. Well, it wasn't told to me he was a doctor.

Q. No, is that your reason you denied this morning a doctor examined you at Division 10?

A. Yes.

Q. What made you change your mind?

A. Because I realized, I stopped and realized after a while that he was a doctor.

Q. When did you stop to realize that?

A. He is the only one that told me to take off my clothes.

Q. When was it that you realized that he was a doctor? [Tr. 896] A. What do you mean, when was it? After you got through talking to me, but it was too late then.

Q. After I got through talking to you?

A. Yes.

Q. I didn't ask you anything about a doctor before recess, did I?

A. You asked me something about a doctor that I can remember.

Q. Do you mean to say I asked you about a doctor before this recess?

A. I am not too sure whether it was you or Mr. Colicchio.

Q. Mr. Colicchio did ask you, didn't he?

A. He did. I realize, I think I know, he did—I don't know.

Q. When did you come to the decision that a doctor did examine you?

A. What do you mean, after he questioned me?

Q. No, when did you decide to testify that a doctor did examine you?

A. When they was taking me out the door, then I remembered.

Q. When who was taking you out the door?

A. The guard.
Q. The guard?
A. Yes.
Q. That was when the Judge left the bench and we had a recess? It was then that you decided that a doctor did examine you, is that right?
A. Well, he didn't have on no white pants.
[Tr. 897] Q. That's when you decided that a doctor examined you, is that right?
A. Yes.
Q. Well, now, how many police officers would you say beat you in Division 10?
A. I would say roughly about three or four.
Q. Roughly about three or four?
A. Three or four.
Q. Hayes is one of them?
A. He is one of them.
Q. Can you give us another name?
A. I do not know them police officers.
Q. Can you give us another description?
A. That place was so loaded I couldn't give you a description.
Q. Your answer is you can't?
A. No.
Q. Hayes is one?
A. That's right.
Q. And that happened when you came in the door?
A. That's right.
Q. And by the door you mean in the main door to the——
A. Coming up from the street.
Q. From the street into the station house?
A. That's right.
Q. Well, Hayes was with you all the way to the station house, wasn't he?
A. No, he was not.
Q. He was not in the car when you were going to the station house?
A. I didn't go in no car.
[Tr. 898] Q. You didn't go in the car?
A. No.
Q. Did you walk there?
A. No, we went in the station wagon.

Q. Station wagon?
A. Police wagon.
Q. How many were in the station wagon with you?
A. There was two.
Q. Was Hayes one of them?
A. No, he was not.
Q. Only two men?
A. That's right.
Q. Did these two men who took you to the station, did they beat you?
A. They slapped me around a little bit, but——
Q. Slapped you around a little bit?
A. That's right.
Q. What do you mean, they slapped you around a little bit?
A. With their fists. They kept asking about the cop. One of them asked the other one, "Is he dead?"
Q. One of them asked the other is who dead?
A. Is the cop dead.
Q. I see. You knew the policeman was dead when you got in the car, didn't you?
A. No, I didn't.
Q. You didn't?
A. No, I didn't.
Q. Didn't you shout at the crowd of people when you were being taken up Fenwood Road, "I'm no cop killer"?

Mr. Colicchio. I pray your Honor's judgment.

A. No.

The Court. I will exclude that on the voir dire.

[Tr. 899] Q. Well now, you were arrested under the porch?
A. That's right.
Q. Did you have a struggle with the police there?
A. No, I didn't.
Q. No?
A. No.
Q. And they didn't abuse you when they took you into custody?
A. When they picked me up from under the porch, they did not put their hands on me, except to——

Q. Didn't put their hands on you?

A. I mean, they handcuffed me but as far as beating me and carrying on, not to my recollection.

Q. Not to your recollection?

A. That's right.

Q. This is the first time that you were in the custody of the police?

A. They told me to come out from——

Q. This is the first time, right?

A. Yes, yes.

Q. And your mind was clear then? Nobody had abused you, is that right?

A. Not that I can remember.

Q. What do you mean, not that you can remember?

A. I was stricken so many times, I can't remember every time, every little incident.

Q. I am talking about under the porch?

A. Under the porch, nobody put their hands on me.

[Tr. 900] Q. How did you get down to the porch?

A. How did I get——

Mr. Colicchio. I pray your Honor's judgment.

The Court. I will exclude that.

Mr. McAuliffe. May I be heard on it at the bench?

The Court. Not on the voir dire. I will exclude it. The presumption is, under the law, that a confession is voluntary, unless it is overcome by evidence which shows it is not. I am not going to get into the question of whether the matters set forth there are true or not, or whether he made statements consistent with some other time. We will narrow it to the question of whether or not, as it has been raised by the voir dire, the statement was voluntary.

You may show, or you may offer evidence, or you may examine the witness concerning his physical condition at that time.

Mr. McAuliffe: That is what I had in mind, your Honor.

The Court: For that purpose, you may proceed.

Q. Did you go over a barbed wire fence before you got under the porch?

A. Not that I can remember.

Q. Did you go over any fence?

A. I went over a small chain link fence, about this high [indicating].

[Tr. 901] Q. Did you get up on a barrel and go over it?

A. No, not that I can remember.

Q. Did you have a cut on your hand?

A. I had a cut on this part of my hand right here.

Q. Did you get that going over the fence?

A. I don't know how I got it.

Q. You don't know how you got that?

A. I don't know how I got it.

Q. Well now, you were in the automobile that crashed into the bus?

A. That's right.

Q. You were the driver?

A. That's right.

Q. How did you feel after you crashed into the bus and was knocked out of the car?

A. I felt all right.

Q. Felt all right?

A. Felt all right.

Q. How fast was that car going when it crashed into the bus?

Mr. Colicchio: I pray your Honor's judgment?

A. I don't know.

Mr. McAuliffe: This is very important.

The Court: What is the objection?

Mr. Colicchio: I don't feel it is material to this issue, your Honor.

The Court: On the question of what his physical condition was when he was apprehended by the police, you may [Tr. 902] have it.

Mr. Colicchio: Note my exception.

Exception No. 59.

The Court: Claim has been made he was bleeding, as I understand it, at some time from some cuts or abrasions on his body. You may have that.

A. What did you say?

Mr. McAuliffe: What is the question, please?

The Court: You may read it.

[Question is read by the stenographer.]

A. Well, the motor, the motor conked out. It was going downhill under its own power.

Q. You mean you were out of gas?

A. Yes.

Q. Going under your own power?

A. Yes.

Q. How fast would you say you were going down that steep hill?

A. I don't know.

Q. Well, approximately?

A. I don't know. I couldn't even estimate.

Q. You couldn't stop it, could you?

A. No. The power brakes had failed.

Q. The power brakes had failed?

A. No.

Q. And how did you hit the bus? Just in what manner did your automobile hit the bus?

A. I don't know. I didn't stay there long enough to find out.

[Tr. 903] Q. You didn't stay there long enough to find out?

A. I know it hit the trolley car or bus or whatever you call it, and I got out and ran.

Q. You got out and ran?

A. That's right.

Q. And limping at the time, were you?

A. No, I was not.

Q. Weren't you injured at all as a result of that automobile, your automobile, crashing into that bus?

A. There was nothing wrong with me, no.

Q. Nothing wrong with you?

A. No, there wasn't.

Q. And you were in good physical condition, I take it, when you left that bus?

A. Well, yes, I would say I was.

Q. Nothing happened to you at all?

A. No.

Q. The side where you were driving was caved in?

A. I don't know which part of the car was caved in. I know the car hit the bus but I don't know, I mean I didn't stay there that long to find out.

Q. Is this the automobile that——

The Court: What is the exhibit number?

Mr. McAuliffe: Exhibit No. 4-E.

A. Yes, looks pretty much like it.

Q. That is the automobile you were driving that crashed into the bus?

A. Yes.

[Tr. 904] Q. And the left front is all staved in? And the area around the door is caved both in and out, right.

A. Yes, but when the car hit the bus, the car hit with such an angle that the door opened. I just automatically flopped out of the car.

Q. You just automatically flopped out of the car?

A. Automatically flopped out of the car in a sitting position. Then I got up and ran.

Q. You mean you were knocked out of the car as a result of the crash?

A. I don't know whether I was knocked out or not, but the way it was, when I ended up, I don't think the door was like that before, but the door was open.

Q. Did you get a good look at the door before you left?

A. No, but the door was open.

Q. But you say you don't think it was as it appears here?

A. No, because the door was opened.

Q. You describe the door as you saw it before you ran?

A. The door was open.

Mr. Colicchio: I am going to object, may it please your Honor.

A. The door was open.

The Court: Wait a minute. What are the grounds of your objection?

Mr. Colicchio: I don't see any materiality to the issue.

[Tr. 905] The Court: On the question of credibility, you may have it.

Mr. Colicchio: Note my exception.

Exception No. 60.

Q. The door was——

A. The door was open when it hit

Q. What happened to your head when you crashed into the bus.

A. Nothing happened to my head.

Q. Nothing happened at all?

A. No.

Q. You had no marks on you?

A. No, I did not.

Q. No bruises of any kind?

A. Not that I can remember.

Q. Not that you can remember?

A. No.

Q. Was your clothing torn or anything as a result of this?

A. No, not that I can remember. Around the back of the auto, it was dark. I tore my clothes a little on the fence, on that small fence that I jumped over. I tore my clothes on that.

Q. All right. Are you familiar with that area where the [Tr. 906] fence is you jumped over?

A. No.

Q. Was that a fence in an alleyway that you went in off Kempton Street?

A. I don't know that area. All I know is I was in back of a yard.

Q. How many fences did you go over——

Mr. Colicchio: I am going to object.

Q. —in back there before you got to where you were found?

Mr. Colicchio: I object

Mr. McAuliffe: Having in mind he has testified he tore his clothes going over a fence, your Honor.

The Court: I know, but I exclude it.

Q. When you tore your clothes going over the fence, did you cut yourself in any way?

A. I think that's where I cut my hand.

Q. You think you cut your hand there?

A. Yes.

Q. How about your legs? Didn't you cut your legs going over the fence?

A. No.

Q. You cut your hand on what, on barbed wire?

A. I don't know what kind of wire it was.

[Tr. 907] Q. But you think you cut it going over the fence?

A. I am pretty sure.

Q. You tore your clothing going over the fence?

A. My clothes were ripped a little bit. The officer did the rest.

Q. Your clothes were ripped a little bit?

A. Yes.

Q. What officer did the rest?

A. The one that came with his dog.

Q. Pardon?

A. The one that came with his dog.

Q. The one that came in with his dog?

A. The one that came in the yard with his dog. He was the first one in, I saw him before he saw me and I came out.

Q. The first officer in?

A. That's right.

Q. A man with a dog?

A. That's right.

Q. A police officer, and you came out for that man, is that right?

A. No. He had his light shining around, so I saw him. So I figured there was no sense in doing anything else, so I [Tr. 908] came out from underneath the porch. He didn't have to tell me to come out. I came out.

Q. That's the man with the dog?

A. That's right.

Q. Not Officer Coyne who testified yesterday that he ordered you to come out?

A. I don't know his name, but I know he had a dog.

Q. I see.

A. I came out.

Q. Well, were you bleeding when you were taken out from under the porch?

A. I think my head was bleeding then.

Q. How about your head? Was your head bleeding?

A. I don't know, I don't know, but, at the time, when he told me to come on out, I don't think my head—if my head was bleeding, it wasn't from an open cut. It could have been from my hand.

Q. Were you wiping blood off your face as you went up Fenwood Road?

A. What do you mean, as I went up Fenwood Road? What do you mean?

Q. Well, the police took you up Fenwood Road, and put [Tr. 909] you in a station wagon you say, is that right?

A. Yes. Well, I didn't know my hand was bleeding.

[Tr. 910] Q. Were you wiping blood off the side of your face when you were outside on Fenwood Street?

A. I was wiping the sweat off my face with this same hand. Evidently blood must have got on it.

Q. You were taken to the station and booked within a few minutes, up to the booking desk?

A. After they got through with me.

Q. You were taken to the booking desk in a few minutes?

A. About a matter of five or ten minutes.

Q. You were in the guard room before you were taken to the desk?

A. If that is what they call it, the guard room.

Q. Where were you booked? Was it the same room you were in? Is that right?

A. Yes.

Q. You were bleeding while you were being booked, bleeding from your head down to your face?

A. I wasn't bleeding until they got through beating me.

Q. At the desk, you were bleeding as you were booked?

A. Yes, after they got through.

Q. Pardon?

A. After they had gotten through.

Q. Now, you've told us about Hayes and do you want to tell us, His Honor, that other officers beat you before you [Tr. 911] were booked within this five minutes?

A. There's other officers that beat me in my head, that's right.

Q. And was that at Station 10?

A. That was at Station 10.

Q. Was that at the big room there, where the desk is?

A. That's right.

Q. And that was where the camera men were?

A. That's right.

Q. And can you tell us the officers? Describe them.

A. I couldn't describe them.

Q. Just how did they beat you?

A. Officer Hayes hauled off and hit me in my mouth two or three times.

Q. We are talking about the blood in your head. You have told us about Hayes.

Q. I was beat in my head with a club or some hard object. I fell to my knees and they picked me up.

Q. This is before you were booked?

A. Before I was booked.

Q. Within a few minutes after you got in the station house?

A. I didn't even hit the door good when——

Q. Didn't hit the what?

[Tr. 912] A. I didn't even get to the door good when they were bringing me up.

Q. Bringing you up from where?

A. From outside. You come up the stairs. I didn't get in the door good and I was snatched by Officer Hayes.

Q. You told us about five or six times that he hit you in the mouth a couple of times.

A. Yes. I was snatched and hit in the mouth.

Q. Officer Hayes—other officers hit you before you were booked? They beat you with a club?

A. A club or some kind of an object.

Q. This was in the big room, camera men were present and several people?

A. That's right.

Q. That is when you started to bleed?

A. That's right.

Q. And the blood running from your head down the side of your face?

A. I don't know where the blood was running from then.

Q. Well, you don't know?

A. I can't say right exactly.

Q. Did you feel blood running down your face?

A. My face was all numb, My head was numb.

Q. So if you were bleeding as a result of being hit over [Tr. 913] the head with a club they went ahead and booked you any way, didn't they?

A. Yes, they did. They booked me.

Q. As I understand it, you went along willingly with the police?

A. You mean from the backyard?

Q. Yes.

A. I didn't put up any fuss with them.

Q. You didn't put up any fuss, just went along with them to the station wagon?

A. When he came and handcuffed me I gave him my hands. Then he took my clothes and ripped them apart.

The Court: Read that last back, please, Mrs. Nurse.

(Last answer read by the stenographer.)

Q. Who is that?

A. The officer with the dog.

Q. The officer with the dog. Do you recognize this picture, sir?

Mr. Colicchio: I am going to object, may it please Your Honor.

The Court: Well, he may answer, yes or no.

Q. Just this picture here. I only showed you this picture. That is you there?

[Tr. 914] A. Well, I'll say it could be. I don't know. I am not sure.

Q. Well, the police got you down on the street to get the cuffs on you, didn't they?

A. I don't know.

Q. Well, you see the picture. See the various people in the picture?

A. I told you I couldn't recognize none of them people.

Q. How about yourself? Do you recognize yourself?

A. My face is not to me. This could be any kind of a picture.

Q. Do you recognize an incident like this happening after you were apprehended?

A. No, no, I don't.

Q. And you are unable to say whether or not that is you being held by the police on the ground?

A. I can't see my face. I know it's a colored man.

Q. Does it look like you?

A. Well, you take a heavy-set colored man and put him in the same position——

Q. How about the shirt on the man there?

A. I can't really tell about the shirt. I am not denying

that I wasn't in the backyard. I was in the backyard, but I am not saying that this picture is mine.

[Tr. 915] Q. I am not questioning you about the backyard. I am questioning you about out in the street, Fenwood Road, after you were taken out from behind the porch. Is that you there?

A. No, I can't see where it is. I can't see where it is. I don't remember no incident like that.

Q. How do you want to leave it?

A. I don't remember no incident like that.

Q. Were you down in the street and the police holding you outside?

A. I do not remember no incident like that.

Q. Well, have you told us everything, told me rather, everything that happened at Station 10 before the booking?

Mr. Colicchio: I pray Your Honor's judgment.

The Court: In response to what question?

Mr. McAuliffe: I'll withdraw it, Your Honor.

Q. Now, as I understand it, Hayes beat you at the door; other police officers beat you: one with some sort of an object that felt like a club, before you were booked, right?

The Court: What is your answer?

The Witness: Yes. Yes, Your Honor.

Q. And you can't tell us who they were?

[Tr. 916] A. No way in the world I could. There were too many in there.

Q. Then you were placed in the cell?

A. That's right.

Q. How long were you in the cell—strike that. Did somebody beat you in the cell?

A. Well, I know two or three officers came into the cell that I was in.

Q. Did they beat you?

A. They did a good job on my mid section.

Q. Huh?

A. They did a good job on my midsection, my stomach.

Q. Who are they.

A. I don't know them.

Q. How soon after you were put in the cell did this happen?

A. About five minutes.

Q. About five minutes?

A. Five.

Q. Can you tell us any of the names of any of these officers?

A. I don't know their names.

Q. But there were about three or four of them in the cell with you?

[Tr. 917] A. They let three of them in, about two or three of them in.

Q. Which is it, two or three?

A. They let two or three in the cell and one standing outside.

Q. This is five minutes after you were put in the cell?

A. I'd say about five minutes.

Q. You'd say about five minutes. Did anyone else come in the cell and beat you after that?

A. You mean after they came in.

Q. After they beat you, did they leave?

A. Nobody else came in.

Q. Just these two or three officers?

A. They came in; they beat me; then they left. They wanted some more pictures. They said, "Bring him out."

Q. They brought you out and had pictures taken after you were beaten. Were you bleeding then?

A. I don't know. I assume I was bleeding.

Q. Could you feel blood?

A. I was all groggy.

Q. You were groggy?

A. Yes.

Q. Well, you can't tell us whether or not you were bleeding at that time?

[Tr. 918] A. Well, I must have been bleeding.

Q. And how did these three fellows belt you in the cell?

A. They beat me in my stomach.

Q. Any other way?

A. No, they didn't put their hands in my face.

Q. After the beating, they took you out and had your pictures taken?

A. They didn't take me out. They left another officer came in and said they wanted more pictures.

Q. Another officer came out, took you out after you were beaten?

A. They came in and took me out.

Q. After you were beaten by these two or three officers?

A. That's right.

Q. How many pictures did they take of you?

A. I can't rightly remember.

Q. And where? What part of the station house were the pictures taken?

A. Well, when you come out from where the cells are in Station 10 you turn right. There is a doorway. They took me between. I was standing between the benches. And there is a desk that sits up on a platform. I guess it was right in that area.

Q. Right in that area?

[Tr. 919] A. I guess they had my arms stretched out.

Q. A lot of people there while you had your pictures taken?

A. There were a lot of people there.

Q. How many pictures did they take?

A. I don't know.

Q. Then you were brought back to the cell?

A. That's right.

Q. And were you beaten after that in the cell?

A. Not that I can remember.

Q. Were you beaten any place in Division 10 after that?

A. No, not that I can remember.

Q. And some time later on you were taken down to headquarters, is that right?

A. That's right.

Q. Now, do I understand you to say you gave this statement because of the beating that you got, both at 10, Station 10 and down at headquarters?

A. I didn't give no statement at Station 10.

Q. I asked you if the statement that you gave, that you read during recess, if you gave that because of the beating you received at Division 10 and down at police headquarters? Is that why you gave the statement?

A. No. The statement is true, but it was, it wasn't—

[Tr. 920] They didn't give it voluntarily.

Q. The statement is true?

A. That's right.

Q. Why did you give it?
A. Why did I give it?
Q. Yes.
A. I didn't have no alternative.
Q. Why not?
A. Because he grabbed me by my testicles.
Q. That is, the officer that was with Lt. Donovan, or whoever questioned you, and the man that was holding your hands up?
A. I am not saying it's Donovan. I am not saying it was Detective Donovan. I am saying it was four officers in there and the names do not relate with the names that are on that piece of paper right there.

The Court: Let me have that last answer, please.

(Last answer read by the stenographer.)

Q. This is the statement you have looked over, that you gave, right? Is that right. It is a true statement?

Mr. Colicchio: I pray Your Honor's judgment.

Q. It's a true statement?
A. It wasn't given voluntarily.

Mr. Colicchio: I pray Your Honor's judgment.
[Tr. 921] The Court: The question is whether it was given voluntarily. The question of the truth is not involved in the voir dire.

Q. You say it was not given voluntarily?
A. No.
Q. It was given because some officer held you by the testicles while you were giving the statement?
A. That's right.
Q. All during the time you gave the statement he was holding you in that way, by the testicles?
A. Not when the stenographer come in. I was told to repeat what he said. It wasn't given voluntarily by myself.
Q. Who told you to repeat everything that was said?
A. I am pretty sure it was McNamara, whatever his name is.
Q. The one that is in the picture?
A. Yes.
Q. All right.

A. Mr. McAuliffe: Have Mr. McNamara step in, will you please?

Q. Take a look at this man. See the man?

A. That's him.

Q. That is the man?

[Tr. 922] Mr. McAuliffe: All right, sir.

The Court: Now, let's be sure.

Mr. McAuliffe: May the record show that this is Detective Emmet McNamara. Is that right?

Mr. McNamara: Yes, sir.

Mr. McAuliffe: Division 16, Boston Police?

Mr. McNamara: Yes, sir.

The Court: And the testimony of the witness is that he was present in the room when the statement was given. Is that your testimony?

The Witness: That's right.

The Court: All right. You may step out.

Mr. McAuliffe: Step outside.

Q. And he is the man that held you by the testicles?

A. He is the one that held my hands over my head and he was present in the room when the statement was given.

Q. Who held you by the testicles?

A. It was another officer.

Q. Can you tell us who that was?

A. I cannot tell you his name.

Mr. McAuliffe: Sergeant Cunningham. Will you ask him to step in, please.

Q. Do you recognize this man?

The Court: Do you recognize him?

[Tr. 923] A. Yes, I do.

Q. Was he the man?

A. No.

Q. That you testified to as to what was done to you that caused you to give——

A. He didn't put his hand on me. That is, I am pretty sure he was sitting on the lefthand side.

Q. He didn't touch you?

A. No.

The Court: Was this man here in the room at the time you gave this statement?

The Witness: I am almost sure of it. I am almost sure of it.

The Court: All right.

Q. Was he present when this other officer did to you what you told His Honor?

A. Yes, he was.

Q. He was present when that took place?

A. Yes he was. There were four of them.

Q. He is one of them and the man that left was another one?

A. That's right.

Q. And you are not sure of Lt. Donovan?

A. Donovan I am not sure of. If I seen the face.

[Tr. 924] Q. The man that came in here and identified himself as Lieutenant Donovan?

A. I am not positive about him.

Q. You are not positive about him. All right, sir.

Mr. McAuliffe: Will you step out?

The Court: All right, you may step out. For the record, by agreement, can the person who just came into the room—Hold him for just a moment. Can you agree upon the identity of that person?

Mr. Colicchio: Yes, I will agree.

The Court: Who is it, Mr. McAuliffe?

Mr. McAuliffe: Detective Sergeant Thomas Cunningham.

The Court: Do you agree, Mr. Colicchio?

Mr. McAuliffe: Yes, I agree.

Mr. McAuliffe: Division 16.

The Court: All right.

Mr. McAuliffe: Now, bring in Sergeant Gannon, please.

The Court: Come forward.

Q. Recognize this man?

A. Yes.

Q. Was he in the room?

A. I am almost positive.

[Tr. 925] Q. And is he the man that did to you what you told His Honor, that caused you to give this statement?

A. No, I wouldn't say that it was him. There is another one.

Q. You wouldn't say it's him?
A. No.

The Court: Let's have the person identified for the record.

Mr. McAuliffe: May the record show that the person being called before the witness is Detective Sergeant Leo Gannon.

The Court: Do you agree, Mr. Colicchio?

Mr. Colicchio: I agree, Your Honor.

The Court: All right, you may step out.

Mr. McAuliffe: Homicide Unit. Add that, please.

The Court: Well, the person is the important factor here.

Q. You told us there were four men in there?
A. There was four men.
Q. One man questioning you, right?
A. That's right.
Q. And three other men?
A. Well, they all——
Q. Wait a minute. Three other men were there?
[Tr. 926] A. That's right.
Q. And one of them is the man that squeezed you the way you described?
A. Well, they all beat me, so far as that is concerned; but so far as squeezing my testicles——
Q. All of them?
A. All of them had a hand.
Q. How about these three that just left? Did they all do it?
A. They all had a hand.
Q. Take the man we had here.
A. It was done twice.
Q. Did he do it, the man that just left here?
A. He did the first time.
Q. How about the man before him, Cunningham?
A. No.
Q. All right. How about—and Lieutenant Donovan you are not sure of, is that right?
A. I am not sure, looking at his face.

The Court: I want to follow this. He is not sure he was present. That is what I understand his testimony is. Is that your testimony?

The Witness: Yes. I am not sure he was present.

Q. There were four men in there?

[Tr. 927] A. Four men in that room.

Q. Of those four men, how many abused you in the manner you told His Honor?

A. Actually all of them did.

Q. All of them, including the man that questioned you?

A. The one that questioned me and the one that was on the side, he abused me some, but he didn't abuse me as much as the others.

Q. The one on the side did abuse you?

A. Yes, he abused me.

The Court: What did he do?

The Witness: He slipped me around and hit me on the side and give me these pills and when I passed out, when I come to he would put this stuff on my nose.

Q. You told His Honor previously that that man didn't do anything to you, is that right?

A. He didn't squeeze my testicles.

Q. He just slapped you around?

A. He slapped me around.

Q. How many men squeezed your testicles?

A. There were two.

Q. Now there's two?

A. There's two.

[Tr. 928] Q. And two of them have appeared here before you?

A. No. There's another one which I am not sure of his face.

Q. Well, one of them that did appear before you here is one of them?

A. Yes, I would say.

Q. Is that Cunningham or Donovan?

A. That would be the one that, the one that just previously left here.

Q. The one what?

A. The one that just left here.

Q. The one that just left, is that right?

A. Yes.

The Court: Do we agree that the name of that man is——

Mr. McAuliffe: Sergeant Gannon.

Mr. Colicchio: I'll agree, Your Honor.

Q. He is the only baldheaded man that presented himself here, is that right?

A. Yes, so far as——

Q. Where did this coathanger incident take place?

A. It took place downstairs across from the—in the room where they have the teletype machine.

Q. The room they have what?

[Tr. 929] A. There is a teletype machine in there.

Q. In headquarters?

A. Yes. It looks like a teletype machine.

Q. What did they do with those coat hangers?

A. They beat me with the coat hangers.

Q. Where did they beat you with the coat hangers?

A. Down below my mid section, down here.

Q. With the coat hangers they were beating you?

A. They took the coat hangers and pulled them that way so the hook would be there and they beat me with them.

Q. Were you dressed or stripped at the time?

A. I was dressed.

Q. Can you tell us any of the officers that did that to you?

A. I can tell you an officer that was there.

Q. Tillotston?

A. I can't give you name for name, but he is attached to headquarters.

Q. I ask you to describe him.

A. Yes, I can. He is tall. He has a little buck teeth. He might have a tooth missing. He wore a soft hat. I'd say he was about six, two.

Q. You don't know what his name is?

A. I don't know what his name is.

[Tr. 930] Q. You didn't hear him referred to by name?

A. No.

Q. Well now, Mr. Johnson, it's a fact, isn't it, the reason you gave this story is because you were identified by several witnesses in the line up? Isn't that right?

A. No, it's not.

Mr. Colicchio: I pray Your Honor's judgment.

Mr. McAuliffe: I think that is material, Your Honor.

The Court: As to whether or not it was given voluntarily, for that purpose and that purpose only he may answer.

Mr. Colicchio: Note my exception, please.

Exception #61

A. No, it's not.

Q. It's not?

A. No.

Q. Does the fact that several people had identified you in the lineup influence you in any way to give this statement?

A. No, because it was the truth.

The Court: The answer may stand as, no.

Q. The police did give you, made provision for you to [Tr. 931] get clean, a clean shirt, white shirt to wear when you went to Court that morning?

A. No. My wife brought that down to me.

Q. Didn't your wife tell you the police had called her and told her where to see you?

A. My wife saw the pictures on the television and she seen how I looked.

Q. Did you have information or did you know that Graves had gone out to your house before you gave this statement?

Mr. Colicchio: I pray Your Honor's judgment.

Mr. McAuliffe: On the same issue, Your Honor.

The Court: On the limited issue as to whether or not it was given voluntarily, he may have it.

Mr. Colicchio: Please, note my exception.

Exception #62.

A. No, I didn't.

Q. Well, you went to Court the following morning, which was Friday morning, is that right, after all these things that took place at Station 10 and police headquarters? You went to Court the following morning down here in the courthouse, is that right?

A. That's right.

Q. Now, Graves was placed in a cell next to you at Station [Tr. 932] 10, isn't that right?

A. I didn't see Graves. I hadn't seen him.

Q. You didn't see him in the cell next to you?

A. No, I didn't.

Q. Didn't talk to him?

A. No.

Q. And you knew he was in Division 10, didn't you?

A. No, I did not.

Q. Didn't the police officers ask you about the registration of the car?

A. They did.

Q. And tell you what Graves had told them as to the registration?

A. No, they did not.

Mr. Colicchio: I pray Your Honor's judgment.

Mr. McAuliffe: That is to the same issue, Your Honor.

A. No, they didn't.

The Court: Wait a minute. Just a minute. What is the defendant's contention, that this statement was given because of the physical beating that was given to the defendant?

Mr. Colicchio: That in addition, Your Honor, to the physical condition of the defendant, as a result of these beatings, [Tr. 933] physical and mental.

The Court: Well, it's the same factual situation as contended by the defendant, isn't it?

Mr. Colicchio: Yes Your Honor.

The Court: The Court will rule that a confession is presumed to have been voluntarily given, unless the evidence is shown to the contrary. And that is all that the issue is here. The presumption is that a confession is voluntarily given.

Mr. McAuliffe: I have no further questions.

Redirect examination.

By Mr. Colicchio:

Q. Mr. Johnson, you said that the officers squeezed your testicles?

A. Yes, they did.

Q. As a result of that did it cause any bleeding?

A. Yes, it did.

Q. In what area?

A. Down in my groin.

Q. Pardon?

A. Down in my groins, whatever they call them, not in my testicles.

Q. Were you wearing some under shorts that morning?

A. Yes, I was.

Q. I show you these and ask you to examine them. Do [Tr. 934] you recognize them?

A. Yes, those are mine.

Q. And those are the shorts you were wearing that morning?

A. Yes.

Q. There is a stain on them. Can you tell us how that stain got there?

A. I was squeezed by my testicles.

Q. And what is this stain?

A. Blood.

Mr. Colicchio: I'd like to offer these for the purpose of the voir dire. Your Honor.

The Court: Any objection?

Mr. McAuliffe: No objection, Your Honor.

The Court: They may be marked as an exhibit. Mark it V-1.

(Received and marked Exhibit V-1)

Mr. Colicchio: I have no further, nothing further of this witness. Your Honor.

Recross-examination.

By Mr. McAuliffe:

Q. Well, these shorts you were wearing, were they turned over to your wife?

A. No, they was not.

Q. Did you talk to your wife?

A. My wife came into the station.

[Tr. 935] Q. Did you talk to your wife about these shorts?

A. Well, she came in.

Mr. Colicchio: I object, if Your Honor please.

A. When she came to Station 10 she asked me what happened and she brought me some clothes.

The Court: The question is: Did you talk to her about them?

Q. Did you?
A. Did I talk to her about them?
Q. About these shorts?
A. Not particularly.
Q. Particularly or otherwise, did you talk to her about these shorts that you had blood on them?
A. Down at Station 16, yes.
Q. Did you give them to her?
A. No, I did not.
Q. Your attorney had them in possession all this time?
A. No, I had them at Charles Street.
Q. You had them at Charles Street?
A. That's right.
Q. The police left these shorts on you from the time this thing happened to you until you went to Charles Street jail and they were removed from you there?
A. The police didn't know I had them.
[Tr. 936] Q. They stripped you down?
A. They did not know I had blood in my underwear.
Q. They stripped you down, didn't they?
A. They did not.

Mr. McAuliffe: That is all.
The Court: Anything further from this witness?
Mr. McAuliffe: Nothing from me.
Mr. Colicchio: That is all, thank you, Mr. Johnson.
The Court: Step down. Return him to the enclosure.
Does the defendant have any more evidence to offer on the voir dire?
Mr. Colicchio: Yes, Your Honor.
The keeper of the records at Charles Street jail.

JOHN S. KELLEY, duly sworn:

Direct examination.

By Mr. Colicchio:

Q. Will you tell the Court your name, please?
A. John S. Kelley.
Q. And you are a physician?
A. Yes, sir.
Q. And you are the doctor that treats the inmates down at the Charles Street jail?
A. Yes, sir.

[Tr. 937] The Court: Where do you live, sir?
The Witness: 812 Center Street, Jamaica Plain, Massachusetts.

Q. Doctor, will you give the Court your academic and professional background?
A. I was graduated from Boston University School of Medicine, interned——
Q. What year, doctor?
A. 1930.
Q. Interned——
A. Interned on surgery at the Carney Hospital, have been in practice since '33.
Q. General practice, doctor?
A. General practice and surgery.

[Tr. 938] Q. Doctor, at some time during the month of August, did you have occasion to see Ronald Johnson down at the Charles Street Jail?
A. Yes, sir.
Q. Will you tell us when it was you first saw Mr. Johnson?
A. August 2, 1963.
Q. At that time did you conduct an examination of Mr. Johnson?
A. Yes, sir.
Q. Will you tell us what your examination consisted of?
A. Examination showed discoloration, what we call ecchymosis below the left eye, abrasion of the right thigh—that's a little cut—and a laceration on top of the scalp.

And there is a puncture wound of the right palm of the hand.

Q. Did you give Mr. Johnson some treatment?

A. We dressed the wound.

Q. How often did you see him subsequent to that date?

A. I couldn't say how often. It would be on our day book down there. I know I come in every day. I couldn't give you the dates.

Q. At some time, was the defendant Johnson transferred to the Boston City Hospital?

A. Yes, sir.

[Tr. 939] Q. Had you examined him just prior to his being sent to the Boston City Hosiptal?

A. Not just prior.

Q. When was it?

A. Probably a day or so before.

Q. Do you recall the date that he was taken over to the Boston City Hospital?

A. Yes, sir, on the record.

Q. What date was that?

A. 8/15/63—August 15, 1963.

Q. And prior to August, 1963, when had you last examined Mr. Johnson?

A. I couldn't tell you exactly, sir.

Q. Can you tell us approximately?

A. It could be any day that we run the clinic that he came up there. I remember seeing him quite often.

The Court. Let me interrupt for a moment.

Mr. McCarthy, you may take the jury to lunch.

Proceed.

Q. Did you see Mr. Johnson sometime after he had been taken over to Boston City Hospital?

A. Yes, sir.

[Tr. 940] Q. When was the next time you saw him?

A. From the City Hospital, sir?

Q. Yes, the next time after August 15.

A. He came right into the yard and was transferred to Norfolk.

Q. What day was that, Doctor?

A. 10/8/63.

Q. Did you examine him on that date?

A. No. He came right in the yard and——

Mr. McAuliffe. 10/8, did I understand? October 8?

The Witness. Yes, sir, 10/8 I have here. No, the date he returned, that's the date he returned from Norfolk, I am sorry.

Q. What was the day he went down to Norfolk, do you know?

A. No, I don't, sir.

Q. After he returned from Norfolk, did you have occasion to again examine him?

A. Yes, sir.

Q. What did your examination disclose at this time?

A. That time, he showed a small drainage wound on top of his head.

Q. Was that the only thing that was shown at that time?

A. Yes, sir.

[Tr. 941] The Court. When was that?

The Witness. That would probably be the next day that he returned from Norfolk.

The Court. When was that?

The Witness. 10/9.

The Court. According to the calendar, October 9?

The Witness. Yes, your Honor.

Q. Other than yourself, Doctor, do you know whether or not anyone else treated Mr. Johnson down at the jail?

A. Yes, sir.

Q. Who else treated him?

A. It would be my male nurse, Mr. Donahue, or my female nurse, Miss Currier.

Q. Is Mr. Donahue available at this time?

A. He is now in the hospital about to be operated upon.

Mr. Colicchio. Thank you, Doctor. That is all I have.

Mr. McAuliffe. No questions.

The Court. You may step down.

Mr. Colicchio. The keeper of the records, Boston City Hospital

[Tr. 942] WILLIAM R. TRAFT, Sworn.

Q. [By Mr. Colicchio] Will you give us your name, please?

A. William R. Traft.

Q. What is your address, sir?

A. 10 Woodfield Street, Dorchester 22, Mass.

Q. By whom are you employed?

A. Boston City Hospital.

Q. What is your position there?

A. I work in the Administrative Building and I am in charge of bringing records to court.

Q. Do you have with you some records pertaining to Ronald Johnson?

A. No. They were turned over to Mr. McAuliffe.

Q. Did Mr. AcAuliffe summons these in?

A. I believe so. I didn't handle them when they were turned in to him.

Q. Are those the records pertaining to Ronald Johnson?

A. Yes, they are.

Q. Tell us the date of admission to the Boston City Hospital?

A. He was admitted on 8/15/63.

Q. From the records, can you tell us the name of the attending physician?

[Tr. 943] A. Dr. Robertson, Jr.

Q. The records contain in them the diagnosis upon admission of Ronald Johnson?

A. Upon admission?

Q. Pardon?

A. Diagnosis upon admission?

The Court. Have you seen these records, Mr. Colicchio?

Mr. Colicchio. No, I haven't, your Honor.

The Court. I will recess until two o'clock to give you a chance to examine them.

[Court recessed for luncheon recess at 12:48 P.M.]

[Tr. 944] AFTERNOON SESSION

[The Court came in at 2:06 P.M.]

The Court. You may poll the jurors.

[The jurors were polled and the defendants answered to the calling of their names.]

The Court. You may seated, ladies and gentlemen.

I have asked you to come to the court room for the purpose of merely advising you that we have been in session since early this morning dealing with matters of law that concern the Court, and do not properly concern the function of the jurors.

I thought that this might be an interlude during the day so that you would appear in the court room, but I am going to ask you right now to retire again because we have not yet completed our labors in that respect.

The jurors may be taken to their room.

[The jury left the court room at 2:08 P.M.]

The Court. You may proceed with the presentation of the evidence upon the voir dire.

Mr. Colicchio. May it please your Honor, with respect to the witness who was on the stand just prior to lunch, I merely had him summonsed here to bring the record with him.

[Tr. 945] I understand now that Dr. Robertson is outside. I would like to call him and use the records through him rather than the prior witness.

The Court. You have completed the testimony of the witness Traft?

Mr. Colicchio. Yes, your Honor.

The Court. Any examination, Mr. McAuliffe?

Mr. McAuliffe. No, your Honor.

The Court. All right. Next witness.

Mr. Colicchio. Dr. Robertson.

[Tr. 946] LAWRENCE M. ROBERTSON, JR., Sworn

Direct examination.

Q. [By Mr. Colicchio] Give your name, please, sir?

A. Lawrence Marshall Robertson, Jr.

Q. Your address?

A. 8 Verndale Street in Brookline.

Q. And your profession?

A. I am a physician at the City Hospital.

Q. Will you give us your educational and professional background?

A. Certainly. I went to the University of Colorado for undergraduate schooling, the University of Colorado for medical school, and I spent a year at Kings County Hospital in Brooklyn, New York, as an interne. Following that, I was a general surgical resident at St. Joseph's Hospital in Denver. I was a neurological resident at the University of Colorado for another year, and the remainder of my times has been spent at the Neurosurgery Department at the City Hospital.

Q. Doctor, some time in August, did you have occasion to see one Ronald Johnson?

A. Yes, I did.

Q. Do you recall the date that you saw him?

[Tr. 947] A. I would have to look at the record.

Q. The first time?

A. I would have to look at the record to see.

Q. Are these the records you are referring to?

A. Yes, they are. I saw him on the 15th of August, 1963.

Q. At that time, doctor, did you conduct an examination of Mr. Johnson?

A. Yes, I did.

Q. Will you tell us what your examination revealed?

Mr. McAuliffe. I pray your Honor's judgment.

The Court. For what purpose is this offered?

Mr. Colicchio. I am offering it, your Honor, to show the extent of the injuries that the defendant Ronald Johnson suffered as a result of the alleged beating.

The Court. This is an examination made when, what date?

The Witness. On the 15th, sir, 15th of August.

The Court. How is that relevant to what his condition was on August 1 or August 2?

Mr. Colicchio. Well, it is relevant, I feel, your Honor, [Tr. 948] in the sense that because of the nature of the injuries, the defendant's condition on the date of the alleged statement was such that, physically and mentally, he was bothered thereby being more subject to giving an involuntary statement. I feel that the injuries that the doctor here observed and treated were such that would have been caused some time prior to the date of the doctor's examination, consistent with the beating that the defendant says he suffered on August 1st and 2nd.

The Court. The defendant himself has offered evidence as to what the injuries were, has testified as to what his injuries were, as of the time that he gave the statement. Do you anticipate that this witness is going to say anything more concerning those injuries, add anything to them?

Mr. Colicchio. Yes. He would add the severity of the particular injury.

The Court. I think you better point it out. What injury do you suggest that you are expecting testimony on?

Mr. Colicchio. The injury to the portion of the defendant's head which required surgery, which, we allege, [Tr. 949] the injury, was caused at the time of the beating.

The Court. Anything else?

Mr. Colicchio. No, your Honor.

The Court. Just the injury to the head?

Mr. Colicchio. Yes, your Honor.

The Court. That is the only purpose for which this witness is called?

Mr. Colicchio. Yes, your Honor.

The Court. To testify as to the extent of that injury and the effect of that injury upon the condition of the defendant on August 2?

Mr. Colicchio. Yes, your Honor.

The Court. That is, you anticipate eliciting an opinion from the doctor as to the effect of that injury on the defendant as of August 2?

Mr. Colicchio. No, your Honor.

The Court. Or August 1?

Mr. Colicchio. I didn't intend to ask him that.

The Court. Then how is the testimony relevant?

Mr. Colicchio. It is relevant, your Honor, to show the severity of the injury that the defendant received on August 1st or 2nd.

[Tr. 950] The Court. Well, the doctor did not examine him on that occasion, as I understand it?

Mr. Colicchio. No, he did not, you Honor.

The Court. Well, I would still like to see the connection between what the doctor saw on August 15—is that the date?

The Witness. Yes, sir.

The Court. —and August 1 and August 2.

Mr. Colicchio. Well, your Honor, you have had testimony from Dr. Kelly of the Charles Street Jail with respect to his examination of Mr. Johnson on August 2d. His testimony was that Dr. Kelly had seen the defendant Johnson at the jail on some occasion subsequent to August 2d, and that on August 15th, his record showed that the defendant was transferred to the Boston City Hospital.

The Court. That's right.

Mr. Colicchio. I feel that that has been sufficient to connect the complaints of the defendant on August 2, to the testimony I now wish to offer by Dr. Robertson.

The Court. With respect to the head?

Mr. Colicchio. Yes, your Honor.

The Court. Only the head.

Mr. Colicchio. Only the head. All right.

[Tr. 951] Mr. McAuliffe. I object to it, your Honor.

The Court. He may answer. Unless it is connected with what his condition was on August 2, 1963, it has no relevance, but you represent that you propose to show the relevancy, is that correct?

Mr. Colicchio. I feel, your Honor, that I have shown relevance by the testimony already offered.

The Court. You have offered testimony as to what he did, where he was and where he was moved, to yes.

Mr. Colicchio. I intend to offer no further evidence with respect to the relevancy, your Honor.

The Court. You may have the question concerning what he saw, but unless it can be connected, either logically or chronologically, with the condition of the defendant on August 2, I suggest it has no revelance. I suggest that only to point out that I am going to hear testimony that has

some relevance to what his condition was at the time the statement was given.

It is for that purpose you are offering it, is it?

Mr. Colicchio. That's correct, your Honor.

The Court. All right, proceed.

Q. Doctor, did you conduct an examination of the head of [Tr. 952] Mr. Ronald Johnson on August 15th?

A. Yes, I did.

Q. Will you tell us what your examination disclosed?

A. There was a healed one centimeter scalp laceration in the right parietal area—that's back in this area—and there was a hemorrhage in the left conjunctiva of the eye.

Q. Did you treat Mr. Johnson while he was at the Boston City Hospital?

A. Yes, I did.

Q. Will you tell us what your treatment consisted of?

Mr. McAuliffe. Object, your Honor.

The Court. I am receiving this testimony upon the representation that, of course, it had some relevance to August 2d. Unless it has it may be stricken. Proceed.

A. On August 16, the patient underwent what is called a right carotid arteriogram. At that time it revealed, in my estimation, that the patient was suffering from what was called a subdural hematoma, a collection of blood between the dura and the brain itself. I then operated on the patient for this condition on August 17, 1963, and found that indeed the patient did have a subdural hematoma.

Q. Doctor, do you have an opinion as to how long that [Tr. 953] subdural hematoma had been present?

A. Could have been there anywhere—

The Court. No, no. Do you have an opinion as to how long it was there?

The Witness. Yes, I do.

Q. Will you tell us what your opinion is?

A. It could have been there anywhere from one to two weeks.

Q. Doctor, do you have an opinion as to the cause of this subdural hematoma?

Mr. McAuliffe. I pray your Honor's judgment.

The Court. Excluded. Don't answer that question.

Mr. Colicchio. I am going to press the question, your Honor.

The Court. Excluded.

Mr. Colicchio. Note my exception.

Exception No. 63.

I have no further questions, your Honor.

Mr. McAuliffe. No questions.

The Court. You may step down.

Mr. McAuliffe. I ask that the testimony be stricken, your Honor?

The Court. No, I will let it stand until I hear all of the testimony on the voir dire.

[Tr. 954] Mr. Colicchio. The defendant Johnson has nothing further to offer on voir dire.

Mr. McAuliffe. I am going to ask your Honor to rule that the prima facie presumption that this statement given by the defendant Johnson was voluntary, still stands, and has not been overcome by any evidence worthy of belief that has been offered to your Honor.

The Court. Is the Commonwealth not going to offer any testimony as to what took place at headquarters?

Mr. McAuliffe. The Commonwealth does propose to offer evidence.

The Court. I think I better hear that before I make any rulings of law with respect to this at this time.

Mr. McAuliffe. All right.

Officer McNamara.

[Tr. 955] EMMETT F. MCNAMARA; Sworn.

Direct examination.

Q. [By Mr. McAuliffe] Your full name, sir?
A. Emmett F. McNamara.
Q. Where do you live, sir?
A. 9 Coronado Road, Hyde Park.
Q. You are a police officer?
A. Yes, sir.
Q. Attached to Division 16?
A. Yes, sir.
Q. What capacity?
A. A detective.

Q. On August 2, 1963, Mr. McNamara, were you present at a time when Lieutenant John A. Donovan of the Homicide Unit of the Boston Police question the defendant Ronald Johnson, and at which a stenographer George Indingaro, was present?

A. No; I wasn't.

Q. Were you at any time present during my questioning by Lieut. Donovan of the defendant Johnson?

A. At no time.

Q. Did you at any time hold the defendant Johnson's hands over his head while he was being questioned by anyone at headquarters or any place?

A. No, sir.

Mr. McAuliffe. Do you have that picture you used today, that photograph you used?

[Tr. 956] Just for the record, your Honor, I want to show through this photograph that was shown to the defendant Johnson——

Q. That is you there?

A. Yes, sir.

[Tr. 957] Mr. McAuliffe: Just so the record may show that witness is the same party that appears in a newspaper photograph dated Saturday, August 3, 1963, the Record Evening American, and that the man in that picture is the man identified by the defendant, Ronald Johnson, as the man that held his hands, Johnson's hands, over his head while he was being questioned by Lieutenant Donovan.

The Court: Is there any objection to that, Mr. Colicchio?

Mr. Colicchio: I have no objection to that.

Mr. McAuliffe: You may inquire.

Cross-examination.

By Mr. Colicchio:

Q. Mr. McNamara, did you see Mr. Johnson at all on the evening of August 1st?

A. Yes, sir.

Q. What was the first time that you saw him?

Mr. McAuliffe: August 1, you say.

Mr. Colicchio: Yes, August 1st.

A. When he was being questioned by the homicide officers.

Q. Where was this?

A. On the second floor, police headquarters.

Q. When was this?

A. Sometime early in the morning, I don't recall the time.

[Tr. 958] Q. That would be the morning of August 2?

A. Yes, sir.

Q. And who was present other than yourself and the defendant, Ronald Johnson?

Mr. McAuliffe: Just a minute. I object, Your Honor, the witness hasn't said he was present. He wasn't asked that question.

The Court: I am listening to the testimony. I want to hear the question and the answer to it.

Q. Who else was present besides yourself and Mr. Johnson?

A. I wasn't present.

Q. Well, I asked you if you had seen him.

A. That is correct.

Q. So that you weren't in the room?

A. That is correct.

Q. What room were they in?

A. There are two rooms there. They were in one room, I was in another.

Q. Was there an open door between the rooms?

A. A closed door.

Q. And you weren't looking into the room then?

A. I was.

Q. Well, sometime the door must have been open, is that right?

A. I wasn't looking through the door.

Q. There were windows?

[Tr. 959] A. There is a window there.

Q. And were you standing at the window?

A. Yes, sir.

Q. Is that the only time that you saw Mr. Johnson that evening?

A. Yes, sir.

Q. You were never in his presence that evening?

A. That is correct.

Mr. Colicchio: I have nothing further.

Redirect examination.

By Mr. McAuliffe:

Q. Describe the window you were looking through, sir, when you saw what took place.

A. There is a three-foot by four-foot two way glass going from one office to another where you can see in and you can't see out.

Q. In other words, you could see into the room but nobody in the room could see out to where you were?

A. That is correct.

Mr. McAuliffe: That is all, sir.

The Court: You may step down.

Mr. McAuliffe: Sergeant Gannon.

The Court: I am not making any voluntary orders here unless I am asked to by counsel.

Mr. Swift, you may bring his request to the attention of [Tr. 960] counsel and if I am asked for a ruling I will make it but I don't make it voluntarily.

Mr. Swift: Doctor Robinson wants to go back to the hospital if you have no further use for him at the present time.

Mr. Colicchio: I have no present need for him at this time.

The Court: Mr. McAuliffe.

Mr. McAuliffe: I have no need for him at this time.

The Court: He is excused; he may return to the hospital.

LEW W. GANNON, Duly Sworn.

Direct examination.

By Mr. McAuliffe:

Q. What is your full name, sir?

A. Leo W. Gannon.

Q. And you are a sergeant?

A. I am a sergeant of Boston Police Department.

Q. And on August 1 and 2, what was your assignment, sergeant?

A. I was assigned to homicide.

Q. And were you present, sergeant, on August 2 between —at the time, rather, from 5:50 a.m. until 6:30 a.m. on that day, August 2, when Lieutenant detective Donovan questioned the defendant, Ronald L. Johnson?

[Tr. 961] A. I was.

Q. And who else was present during this period of questioning?

A. Sergeant Cunningham from Division 16 and a stenographer George Indingaro.

Q. Yourself and Lieutenant Donovan?

A. Myself and Lieutenant Donovan.

The Court: Excuse me, how many altogether?

The Witness: Four.

The Court: Would you state it again, the names?

The Witness: Lieutenant Detective John J. Donovan, myself, Leo W. Gannon, Sergeant Detective Cunningham of District 16 and George Indingaro, the police stenographer.

Q. Now, at any time while this questioning was going on did you grab the testicles of the defendant, Johnson, and squeeze them while he was being questioned, or at any time?

A. No, sir.

Q. Did anyone else there do what I have related to you?

A. No, sir.

Q. Did Sergeant Cunningham at any time strike the defendant, Johnson, during this period of questioning by Lieutenant Donovan?

A. He didn't.

Mr. McAuliffe: Your witness.

[Tr. 962] Cross-examination.

By Mr. Colicchio:

Q. When did the stenographer come into the room, Sergeant?

A. I didn't take exact note of the time the stenographer,

note of the time that he takes the interrogation but I would say roughly around the time that Mr. McAuliffe mentioned.

Q. And had you been in the room with Mr. Johnson prior to the stenographer coming in?

A. I had.

Q. And who else was in the room beside yourself?

A. Lieutenant Donovan.

Q. Anyone else?

A. I believe that Sergeant Cunningham came in the room just prior to the stenographer coming in or about the same time.

Q. What time was Mr. Johnson originally brought into that room?

A. I can't answer that, I don't know.

Q. What time did you arrive at that room?

A. Well, let me leave it this way, that I was in and around the homicide office that morning. To state a specific time I was into that room, I couldn't do that.

Q. Well, prior to this statement being taken by the stenographer there had been some questioning of Mr. [Tr. 963] Johnson in this room, wasn't there?

A. There had been.

Q. And were you present during that?

A. Yes, I was.

Q. And for how long were you present during that interrogation before the stenographer came?

A. Oh, possibly—I don't know, I might have been there ten or fifteen minutes.

Q. And was Lieutenant Donovan doing the interrogating at that time before the stenographer came in?

A. He was.

Q. Do you know what time Lieutenant Donovan went into that room before the stenographer took the statement?

A. No, I don't.

Mr. Colicchio: I have nothing further.

Redirect examination.

By Mr. McAuliffe:

Q. Well, having in mind the time that you just mentioned, Sergeant Gannon, did you squeeze the testicles of the defendant, Johnson, prior to the stenographer coming in at any time?

A. I never touched him at any time.

Q. Did Lieutenant Donovan touch him at any time in your presence?

A. Lieutenant Donovan never touched him at any time [Tr. 964] in my presence.

Q. Or did Sergeant Cunningham?

A. No, sir.

Mr. McAuliffe: That is all.

Recross-examination.

By Mr. Colicchio.

Q. Do you know what time it was that the defendant, Johnson, was brought down to headquarters?

A. No, sir, I don't.

Q. Did you see Mr. Johnson in the lineup that morning at headquarters?

A. Yes, sir, I did.

Q. What time was the first lineup?

A. Well, I don't know; I got there around—I walked into the lineup room somewhere between probably 2:15 and 3 o'clock, I can't tell the exact time. That is a.m.

Q. A.M. And Mr. Johnson was there at that time?

A. Mr. Johnson was either there at that time or come in during that time.

Q. So the first time you saw Mr. Johnson at headquarters was about what time?

A. I would say between 2:15 and 3:00 a.m.

Q. And what time was it that this statement was taken by the stenographer?

A. I would say around 6:00 a.m., between 5:00 and 6:00 a.m.

[Tr. 965] Mr. Colicchio: Thank you, I have no further questions.

Redirect examination.

By Mr. McAuliffe:

Q. And Sergeant, during the period from the time you mentioned, the start up to the time that the statement was taken, was the defendant, Johnson, viewed by various people in the lineup at various times?

A. Yes, sir.

Mr. McAuliffe: That is all.

Recross-examination.

By Mr. Colicchio:

Q. Was the defendant, Johnson bleeding during the lineup?

A. I didn't notice, sir.

Q. You say you saw him?

A. I didn't notice it.

Mr. Colicchio: That is all, sir.

Mr. McAuliffe: That is all, sir.

The Court: You may step down.

THOMAS F. CUNNINGHAM, Duly Sworn.

Direct examination.

By Mr. McAuliffe:

Q. Your full name, sir?

A. Thomas F. Cunningham.

Q. And you are a sergeant detective assigned to Division 16?

A. Yes, sir.

Q. And you were assigned there on August 1 and 2 of last [Tr. 966] year?

A. Yes, sir.

Q. Whether or not you were present at a time on the morning of August 2 when Lieutenant Detective John J. Donovan of homicide questioned the defendant, Johnson?

A. I was.

Q. And who else was there?

A. There was Mr. Indingaro, the stenographer, Lieutenant Donovan and Sergeant Gannon and myself.

The Court: Where did this take place?

The Witness: In the homicide office in police headquarters.

Q. And Mr. Indingaro is a civilian employee, a stenographer employed by the Boston Police?

A. He is, yes, sir.

Q. Now, during the time that Lieutenant Donovan questioned Johnson, the defendant, Johnson, did Sergeant Gannon strike, handle the defendant, Johnson, in any way?

A. No, sir.

Q. Specifically, did he grab or squeeze the testicles of the defendant, Johnson, during the period that he was being questioned?

A. No, sir.

[Tr. 967] Q. Whether or not you at any time struck the defendant, Johnson, in any manner during this questioning?

A. I didn't.

Q. —or at any time prior thereto?

A. I never did.

Mr. McAuliffe: Your witness.

Cross-examination.

By Mr. Colicchio:

Q. What time was it you first saw Mr. Johnson on this morning?

A. The first time I saw Johnson was in Division 10 about 11:30 at night.

Q. What time was the first time you saw the defendant, Johnson, down at headquarters?

A. Sometime around 3 o'clock.

Q. And was that at the lineup?

A. Yes, sir.

Q. When you were in the room and he was being interrogated can you describe his appearance for us?

A. Well, he had his shirt on. He had an injury to his head. His shirt was torn.

Q. Where was the injury to his head, what part of the head?

A. On top of the head.

Q. And was that bleeding?

A. No, sir.

[Tr. 968] Q. Did you notice any other injuries?

A. I didn't.

Q. Did he appear to be alert when he gave this statement that the stenographer took?

A. He did.

Q. He did?

A. He did.

Q. And what time of day was it that this was taken down by the stenographer?

A. It's sometime between, I think it was 5:50 in the morning he was started to be talked to.

Q. Sometime prior to the stenographer taking this statement was the defendant, Johnson, being questioned?

A. No, sir, not to my knowledge.

Q. Did you come into the room with the stenographer?

A. At police headquarters?

Q. Yes.

A. Yes, sir, I did.

Q. So you hadn't been in the room prior to that?

A. No, sir.

Q. Had you observed Mr. Johnson in that room prior to your entering it with the stenographer?

A. He was, if I recall, he was brought into the room when we four were there.

Mr. Colicchio: I have nothing further.

[Tr. 969] Mr. McAuliffe: That is all, sir, thank you Lieutenant Donovan.

JOHN J. DONOVAN, Duly Sworn.

Direct Examination.

By Mr. McAuliffe:

Q. Your full name, sir?

A. John J. Donovan.

Q. And where do you live, sir?

A. 14 Highfield Terrace, Roslindale.

Q. And you are a Lieutenant Detective assigned to homicide unit of the Boston Police Department?

A. Yes, sir.

Q. And you are the Lieutenant John J. Donovan that questioned the defendant, Ronald L. Johnson, on the morning of August 2 at the homicide offices of Boston Police headquarters?

A. Yes, sir.

Q. And was Mr. Indingaro, the stenographer who took down the questions and answers as submitted under your direction?

A. Yes, sir.

Q. Now, Lieutenant Donovan, who else was there besides you and Mr. Indingaro?

A. Sergeant Detective Leo Gannon of the homicide unit and Sergeant Thomas Cunningham of Division District 16. [Tr. 970] Q. Was Detective McNamara of Divsion 16, Emmet McNamara present at all during this questioning?

A. No, sir.

Q. At any time during the questioning of Johnson, Mr. Donovan, or previous to him being questioned, did you strike or beat the defendant, Johnson, in the stomach?

A. No, sir, I didn't,

Q. Did you strike or beat him in any manner at any time?

A. No, sir, I didn't.

Q. Did Sergeant Leo Gannon strike him or beat him at any time during the questioning by you?

A. No, sir, he didn't.

Q. Specifically, did he at any time grab the defendant, Johnson, by the testicles while this was going on?

A. No, sir, he very definitely didn't.

Q. Did Detective Sergeant Cunningham of Division 16, did he strike, beat or manhandle the defendant, Johnson, in any way?

A. No, sir, he didn't.

Mr. McAuliffe: You may inquire.

Cross-examination.

By Mr. Colicchio:

Q. Lieutenant, when was the first time you talked to Mr. Johnson?

A. Briefly about 11:00 a.m., August 1st.

[Tr. 971] Q. And where was that?

A. At District 10 in Roxbury Crossing.

Q. A.M. or P.M.?

A. P.M.

Q. When was the next time you talked to him?

A. At police headquarters at the lineup room at approximately 2:00 a.m., August 2.

Q. And for how long did that conversation take?

A. It was a conversation of a lineup being held at the time and I conducted the lineup.

Q. And when was the next conversation you had with him?

A. Following the lineup my next conversation with him at the homicide office on the second floor of police headquarters on the same morning at approximately 4:30 to 5:00 a.m.

Q. And for how long did you talk with him at that time?

A. I talked to him approximately 15 or 20 minutes the first time and the second time when I took the statement from him approximately 35 or 40 minutes.

Q. And who was with you the first time that you said took 15 or 20 minutes?

A. Sergeant Leo Gannon.

Q. Anyone else?

A. I did have an officer in the room during the time that [Tr. 972] I wasn't in the room. And by best memory is that he was not present during this 15 or 20 minutes interview.

Q. When this statement was taken from Mr. Johnson did you observe whether or not he had any marks or bruises on his face?

A. I did observe, yes, sir.

Q. And did he?

A. No, sir.

Q. Did you observe whether or not he had any marks or bruises on his head?

A. Yes, sir.

Q. And what did you observe?

A. I observed a small bandage on the top of his head.

Q. A small bandage?

A. I believe to my best memory it was a bandage or a mercurochrome or something of that sort.

Q. And during the time of this statement was Mr. Johnson alert?

A. Yes, sir, he was.

Q. At any time while you were talking with him did he lose consciousness?

A. No, sir, he didn't.

Mr. Colicchio: I have nothing further.

[Tr. 973] Redirect examination.

By Mr. McAuliffe:

Q. Well, on the occasion that you say that Mr. Gannon was with you when you talked to him about 15 minutes prior to your questioning with the stenographer, did I understand that to be so?

A. Yes, sir.

Q. Did Sergeant Gannon strike him or specifically squeeze his testicles in any manner during that period?

A. No, sir, he didn't.

Q. Did you strike him in any way, and specifically, strike him in the stomach or beat him in the stomach?

A. No, sir, I didn't.

Q. Did anybody during this period strike Johnson in any manner while you were present?

A. No, sir, very definitely not.

Mr. McAuliffe: That is all, thank you.

The Court: I just have one question, Lieutenant. While you were interrogating the defendant on the second floor, what room do you call that, homicide?

The Witness: The homicide office, yes, Your Honor.

The Court: Will you state again everyone that was in that room, as you recall it.

The Witness: When I was taking the statement, Your Honor?

[Tr. 974] The Court: Immediately before and during the time you were taking the statement.

The Witness: Immediately before Sergeant Gannon was in the room and a Detective Francis Murphy of the special service squad. If I may continue, there were times when I was out of the room and Sergeant Gannon was out of the room to carry on other business, but only to the next office with the doors opened, and I had an officer with him at all times, with Mr. Johnson, who was in the office. And Sergeant Murphy—excuse me, Detective Francis Murphy was present when I was not there.

The Court: Now, when the statement was being taken who was present?

The Witness: The civilian police stenographer, Mr. George Indingaro, Sergeant Detective Leo Gannon of homicide unit, Sergeant Thomas Cunningham of District 16 and myself, Lieutenant Detective John J. Donovan.

The Court: No one else was in the room?

The Witness: No, Your Honor.

The Court: I have no further questions.

Mr. McAuliffe: Thank you.

As I understand the positon of the defense, Your Honor, [Tr. 975] defense claims that this statement was given because of the squeezing of the testicles by——

The Court: Well, I think that the defendant, himself ought to state the grounds on which he objects to the testimony.

Let me ask this: There was testimony given by the defendant this morning that Officer Hayes had something to do with this situation; Officer Hayes came into the room and he was identified in the courtroom.

Mr. McAuliffe: That is right. He didn't give that as a reason he gave the statement, Your Honor.

The Court: Well, I don't know.

Mr. McAuliffe: All right, Officer Hayes.

VINCENT HAYES, Recalled.

Direct examination.

By Mr. McAuliffe:

Q. Your full name, sir?
A. Vincent A. Hayes.
Q. And you have already testified in this case, is that right?
A. I did.
Q. Now, on the night of August 1st where did you see the defendant, Ronald L. Johnson, first?
A. On Francis Street.
Q. Francis Street?
[Tr. 976] A. Yes, I believe it was Francis Street.
Q. Would it be Fenwood Road?
A. Fenwood Road, sir, sorry, sir. Right.
Q. Where on Fenwood Road did you see him?
A. Just in the middle of Fenwood Road, I presume. The street was Albany Street or St. Albans Road and Fenwood Road, right in that vicinity.
Q. You saw him in the vicinity of the intersection of St. Albans Road and Fenwood Road?
A. About that, yes.
Q. You testified yesterday, I believe, he had some blood on his face or coming from the head, is that right?
A. Yes, I did.
Q. And you accompanied him up the street, did you?
A. I did.
Q. To where?
A. To the box.
Q. And what is the number of that box?
A. I'm almost sure it is 47 box or 45 box.
Q. It is located in the vicinity of Brigham Circle, is it?
A. It is.
Q. And did you accompany the defendant, Johnson, to Station 10?
A. I did.
[Tr. 977] Q. And what sort of an automobile did you go in?
A. It was an unmarked police car.
Q. An unmarked police car?

A. Yes, sir.

Q. And who drove it?

A. At the time I don't know what his name is, one of the officers, special officers.

Q. How many of you were in the car with the defendant, Johnson?

A. If I can recall, there was myself, another officer which was another uniformed officer, and two or three plainclothes men in front.

Q. So, that would be what, five police officers?

A. About five police officers, yes, sir.

Q. Now, Mr. Hayes, when you went into Division 10 did you strike the defendant, Johnson, across the mouth?

A. I didn't.

Q. Did you strike him in any manner?

A. I didn't.

Q. Did any other officer strike him?

A. No, not in my presence.

Q. And did you accompany him into Division 10 and to the booking desk?

[Tr. 978] A. I did.

Q. And did any officer strike him in any manner from the time you were in his presence at Fenwood Road until he was brought to the desk and booked?

A. No officer at all in my presence.

Q. Or in your presence at any time thereafter did any officer strike this defendant, hit him with a club or anything?

A. At Division 10, no officers at all.

Q. Is that the only place you saw him, at Division 10, other than bringing him to the station house with other officers?

A. That is right, yes, sir.

Q. I show you this, sir; do you recognize it?

A. Yes, I do.

Q. Recognize yourself?

A. I do.

Q. And this fairly represents you accompanying other officers, the defendant, Johnson, on Fenwood Road to the police box?

A. Yes, that does.

Q. And this is you here, sir?

A. Yes.
Q. And who is this officer?
[Tr. 979] A. I do not know.

Mr. McAuliffe: I offer this, Your Honor.
The Court: Any objection?
Mr. Colicchio: I have no objection, Your Honor.
The Court: This may be marked as an exhibit, V-2.
Mr. Balliro: Is that "V" or "B", Your Honor?
The Court: "V" to identify it with the voir dire.

(Received and marked Exhibit V-2.)

Mr. McAuliffe: You may inquire.

Cross-examination.

By Mr. Colicchio:

Q. Mr. Hayes, did you take the defendant, Johnson, to the booking cage?
A. I did.
Q. And you had other officers with you?
A. There was quite a few officers there at the time.
Q. And this booking cage, what is it, sort of a wire grating there?
A. It is.
Q. Did you punch the defendant, Johnson, in any part of his body at the booking cage?
A. No, sir.
Q. I ask you to look at this picture. Do you recognize yourself in it?
A. I do.
[Tr. 980] Q. Do you recognize Ronald Johnson in it?
A. I do.
Q. Do you recall that picture being taken?
A. Definitely, I do.
Q. Is that a fair representation of you punching Mr. Johnson in the chest?
A. No.
Q. It is not?
A. No, it is the opposite, of his violent reaction towards me at the time. To protect the officers behind the desk.
[Tr. 981] Q. Tell me whose arm that is outstretched, Mr. Hayes?

A. My arm, protecting him from using the violent language, getting violent at the time at the desk.

Q. Did you hit him?

A. At the time, I am telling him to keep quiet.

Q. With your fist?

A. With my hand, it is on him, holding him back from violence, just like that, just as the picture is taken.

Mr. Colicchio. I offer this, your Honor.

The Court. Any objection?

Mr. McAuliffe. No obligation.

The Court. This may be marked V-3.

[Photograph is marked Exhibit V-3.]

The Court. Let me see that, now, please?

[Exhibit is given to the Court.]

Mr. Colicchio. I have nothing further.

[Tr. 982] Redirect examination.

Q. [By Mr. McAuliffe] Now I show you, sir, V-3, exhibit on the voir dire, and this is yours on here, you say?

A. It is.

Q. Are you holding Johnson's arm?

A. Yes, I am.

Q. And you say you were protecting him from, what? Protecting somebody from what?

A. Protecting him from getting violent with the newspaper reporters and the officer, I presume, was behind the desk. He was using very violent language and a bit uncontrollable, and I am holding him back.

Q. What sort of language was he using?

Mr. Colicchio. I pray your Honor's judgment.

The Court. He may answer.

A. Well, at the time, his language was mostly pertaining to me and was very violent. He was using foul language and it was all mostly pertaining to me, myself, like I said before.

Q. His language was foul?

A. Yes.

Mr. McAuliffe. All right. Nothing further.

Recross examination.

Q. [By Mr. Colicchio] At this time you had your arm outstretched, Mr. Johnson was handcuffed, wasn't he?

A. I presume so. Yes, he was.

[Tr. 983] Mr. Colicchio. I have nothing further.

Mr. McAuliffe. All right, sir.

The Court. You may step down.

Anything else?

Mr. McAuliffe. Nothing further, your Honor.

Mr. Colicchio. Nothing further, your Honor.

The Court. Recess.

[Afternoon recess.]

The Court. Mr. Colicchio?

Mr. Colicchio. May it please your Honor, I feel that the evidence offered in behalf of the defendant Johnson should rebut any presumption of voluntariness with respect to this statement allegedly given by the defendant Johnson. Therefore, I am going to ask the Court to rule that the statement is not admissible as against the defendant Johnson because it was not voluntarily made.

The Court. Do you want to state the grounds of your contention?

Mr. Colicchio. The grounds of the contention, your Honor, are that the defendant Ronald Johnson, from the time of his being taken into custody, which was somewhere in the vicinity of 9:30 p.m. on August 1st, up until the time [Tr. 984] that this statement was allegedly given at about 5:50 a.m. on August 2d, the defendant Johnson had received a beating, causing injuries to the defendant Johnson, to the extent that at times prior to giving this statement he was in states of both consciousness and unconsciousness; and that just prior to the statement being given, physical force was used upon the body of Ronald Johnson, which made him involuntarily give the statement that is now being offered for the Court's consideration.

The Court. All right. Mr. McAuliffe?

Mr. McAuliffe. May it please the Court, the Commonwealth submits that the presumption should stand, that this statement given by the defendant Johnson was voluntarily given. We have called every witness we could that

was named, that is alleged to have taken any part in the course of this questioning, and they have flatly denied that any such thing took place. Further, the Commonwealth submits that the story is absurd, to ask your Honor to believe that this defendant may be abused in the manner that he was and then taken out so that the men with the cameras could get a good picture of him in the condition he was; plus the fact that the exhibit offered by the [Tr. 985] defense in support of his contention shows the condition of Johnson at the booking desk and in the same condition he was when Hayes first met up with him down in Fenwood Road. You have all the other subsidiary circumstances here, your Honor, that have been introduced in evidence, plus the crash, the barbed wire fence and all this. That, I submit, your Honor should take into consideration, and I say the presumption should stand.

This statement should go in evidence and be submitted to the jury.

The Court. The preliminary question for the Court here is whether the statement was an involuntary one. Whether the statement is true is immaterial in so far as the determination of that fact is concerned. Whether other evidence tends to establish the truth of this statement or the guilt of the defendant, or tends to corroborate the statement, is likewise immaterial in the factual determination as to whether or not the statement was involuntary, and the Court excludes those matters from its consideration.

The contention of the defendant, as I understand it, [Tr. 986] is what the statement was involuntarily given because of physical force applied to the defendant by the police so that the statement was coerced from him. That is the position as I understand it that the defendant takes. Is that correct, Mr. Colicchio?

Mr. Colicchio. That is correct, your Honor.

The Court. I am not satisfied from the evidence that it was not freely and competently given, and, therefore, I rule that it is admissible.

Mr. Colicchio. Note my exception, your Honor.

The Court. Yes.

Exception No. 64.

The Court. The jury may be brought to the court room.

[The jury came into the court room at 3:30 p.m.]

The Court. The witness Indingaro was on the stand at the time the jurors went into recess last evening.

Mr. McAuliffe. Yes. Mr. Indingaro.

* * * * * * *

[Tr. 1001] GEORGE INDINGARO.

Direct examination.

By Mr. McAuliffe:

* * * * * * *

Mr. McAuliffe. I offer that.

Mr. Colicchio. For the record, I object.

Mr. McAuliffe. May this be marked as an exhibit?

The Court. The grounds of the objection?

Mr. Colicchio. The grounds being the grounds I raised in the voir dire, your Honor.

The Court. It may not be marked as an exhibit in view of the objection, but if the witness has a recollection concerning these matters he may be examined about it.

Mr. McAuliffe. Haven't I done that, your Honor?

The Court. Not in the presence of this jury. He has already testified to me, but this jury has not heard one bit of it.

Mr. McAuliffe. I am sorry.

Q. [By Mr. McAuliffe] Mr. Indingaro, were you present on August 2, when Lieutenant-Detective Donovan questioned the defendant Ronald L. Johnson?

A. Yes, sir.

Q. Did you take the questions asked of the defendant Ronald L. Johnson by Lieutenant-Detective John J. Donovan down in shorthand?

A. Yes, sir.

Q. Did you also take the answers given by the defendant [Tr. 1002] Ronald L. Johnson, down in shorthand?

A. Yes, sir.

Q. And did you later verify your shorthand notes as to the questions asked by Lieutenant-Detective John J. Donovan and the answers given by the defendant Ronald L. Johnson?

A. Yes, sir.

Q. Did you later reduce your notes, that is your shorthand notes, as verified by you, to a transcript?

A. Yes, sir.

Q. Is this the transcript?

A. Yes, sir.

Mr. McAuliffe. I now offer it, your Honor.

Mr. Colicchio. Objection, your Honor.

The Court. It may not be marked as an exhibit, but the witness may testify as to what was said.

Mr. McAuliffe. All right.

Q. Mr. Indingaro, will you face the jury, please, and read the questions that were asked of the defendant Ronald L. Johnson by Lieutenant John J. Donovan, and also read to them the answers given by the defendant Ronald L. Johnson?

Mr. Colicchio. Object.

The Court. And the grounds?

Mr. Colicchio. The grounds I used as the basis for the voir dire, your Honor.

[Tr. 1003] The Court. Which I have already heard.

Mr. Colicchio. Yes, your Honor.

The Court. He may answer the question.

Mr. Colicchio. Please note any exception.

Exception No. 65.

A. Homicide Unit, Police Headquarters——

The Court. No. no. What are the questions and answers. It may be you haven't been asked yet concerning those who were present, but the question that is pending is "What was asked and what were the replies?"

Q. Start off with the questions, please.

A. "Q. [By Lt. Detective Donovan] My name is Lieutenant Detective John J. Donovan; I am attached to the Homicide Unit at Police Headquarters. This gentleman here is Sergeant-Detective Leo Gannon. He is also a member of the Homicide Unit. This gentleman here is Sergeant-Detective Thomas Cunningham. He is attached to District 16. This gentleman here is a police stenographer. His name is George Indinagor. I am going to ask you certain

questions relative to an incident that took place on [Tr. 1004] Boylston Street and an incident that transpired shortly thereafter on Commonwealth Avenue at the corner of Fairfield Street. Are you willing to answer questions regarding this incident?

A. Yes, I am.

Q. What is your full name?

A. Ronald Lee Johnson.

Q. How old are you, Ronald?

A. Twenty-nine years old.

[Tr. 1005] Q. Give the question and then the answer. Say question and answer.

A. Yes, sir. "Q. What is your date of birth?

A. January 17, 1934.

Q. Where were you born?

A. Providence, Rhode Island.

Q. Are you married or single?

A. Married.

Q. What is your wife's name?

A. Violet Johnson.

Q. What was her maiden name?

A. Violet Hazear.

Q. Where do you live?

A. 16 Devon Street.

Q. With whom do you live?

A. My wife.

Q. What floor do you live on?

A. Second floor.

Q. How long have you lived there?

A. Two and one half years.

Q. What is your occupations

A. I don't have, I am not working.

Q. When you did work, what kind of work did you do?

[Tr. 1006] A. Dressed Poultry.

Q. How long have you been unemployed?

A. A year, I sued them.

Q. Do you own an automobile?

A. Yes.

Q. What kind of an automobile is it?

A. A '55 Buick.

Q. What model?

A. Roadmaster.

Q. And what type of a Roadmaster is it?
A. A convertible.
Q. What is the registration?
A. I don't know.
Q. In whose name is the car registered?
A. In his name?
Q. What is his name?
A. Graves.
Q. Why is it registered in his name?
A. Because I sent the insurance company a check for $70.00 and they turned around and cancelled it.
Q. Were you driving the car last night, Thursday, August 1, 1963?
A. Yes, I was.
[Tr. 1007] Q. What time did you leave your house?
A. I left early.
Q. Where did you go?
A. I was up to the Savoy for a while. I picked up this girl. I don't have to give her name, do I?
Q. No. Where is the Savoy?
A. On Blue Hill Avenue.
Q. What time did you leave there?
A. About half past two.
Q. Did you go back there some time later?
A. Later on. Wait a minute, are you talking about Wednesday or Thursday?
Q. Are you talking about Wednesday night or Thursday night? I am talking about Thursday night.
A. Right.
Q. Tell me what you did.
A. I picked up Herbie.
Q. Where did you pick up Herbie?
A. At the Savoy.
Q. What is his last name?
A. Graves.
Q. Did you have your car at this time?
A. Yes, I had it.
Q. About what time did you pick up Herbie?
[Tr. 1008] A. I can't remember.
Q. Was it dark?
A. Just getting dark.

Q. Did you and Herbie have some discussion about something?

A. Yes.

Q. What did you discuss?

A. Getting some money.

Q. And how did you say you would get the money?

A. We were going to rob some place.

Q. Did Herbie agree to go with you?

A. Yes.

Q. Did you have a gun with you at that time?

A. Yes.

Q. What kind of a gun was it?

A. A small one.

Q. Did Herbie see the gun?

A. Yes.

Q. At the Savoy?

A. I did not show it to him then.

Q. After this discussion did you and Herbie then leave the vicinity of the Savoy?

A. Yes.

Q. In the Buick Roadmaster Convertible?

[Tr. 1009] A. Yes.

Q. Who was driving?

A. I was driving.

Q. Where was the gun at this time?

A. Under the dashboard.

Q. Was it loaded at the time?

A. Yes.

Q. How many cartridges did it have? How many bullets in the gun?

A. Three.

Q. Where did you and Herbie go then?

A. Went riding around.

Q. In what general vicinity did you ride around?

A. Oh, all around, Massachusetts Avenue. No, we did not go to Massachusetts Avenue, we went downtown, went over to Columbus Avenue, Boylston Street.

Q. Where did you go when you went to Boylston Street?

A. We stopped at the liquor store.

Q. What is the location of the liquor store?

A. I don't know.

Q. Near where?

A. Around the Prudential Center.

Q. Did you and Herbie have some discussion at that [Tr. 1010] time?

A. Yes.

Q. What did you say to him and what did he say to you?

A. I said the place looks good.

Q. Did you have any further discussion?

A. No. We were not sure what we were going to do.

Q. What did you do then?

A. No answer.

Q. Where did you tell him to drive the car?

A. I told him to stay right there, around the corner.

Q. Did Herbie know you had a gun at this time?

A. Yes, sir.

Q. Did he see the gun?

A. Yes.

Q. So, you say you parked around the corner, around the corner from what street?

A. I guess in between Beacon and Boylston Street. I am not sure. Between Commonwealth Avenue and Boylston Street. I am not sure.

Q. Is that where you got out of the car?

A. Yes.

[Tr. 1011] Q. What did you do when you got to the liquor store?

A. Told the man to give me all the money.

Q. What did the man do?

A. Cooperated.

Q. How much money did you take?

A. I don't know.

Q. Did you take some money?

A. Yes. I put the money in the bag.

Q. What kind of a bag was it?

A. A paper bag.

Q. Where did you get the bag?

A. Herbie got it.

Q. Did you take the bag in the store with you or did you get the bag in the store?

A. I don't remember.

Q. Did anybody else come in the store while you were there?

A. Yes, a woman did.

Q. Did you say anything to the woman?
A. Told her to get down on the floor, "Nobody wants to hurt you."
Q. Did she get down on the floor?
A. She tried to. I said, "Never mind. Stay the way you [Tr. 1012] are."
Q. Did you have the gun showing at that time?
A. Told him I had the gun. I was near the door.
Q. Did the man in the liquor store see the gun?
A. Yes.
Q. Did you point the gun at him?
A. I pointed it at his legs.
Q. What did you say then?
A. Told him to put the money in the bag.
Q. Did he put the money in the bag?
A. Yes.
Q. What did you do then?
A. I told him, "Okay. Stay where you are."
Q. Then what did you do?
A. I headed towards the door.
Q. Where did you turn?
A. Down Boylston Street.
Q. In which direction?
A. Going towards intown.
Q. And what did you do then?
A. I ran to the car.
Q. Did you indicate in any way where you wanted to meet him? Did you see Herbie take off in the car? When you [Tr. 1013] told Herbie to take off, did he take off?
A. Yes.
Q. Now, you are on a street where the car is parked, what direction would you go down?
A. I must have been going towards Massachusetts Avenue.
Q. Do you know what street it was? Was it a street between Commonwealth Avenue and Boylston?
A. Yes, it was.
Q. And you say you went down that street in the direction of Massachusetts Avenue?
A. Yes.
Q. Was there anyone following you at the time?
A. People were running after me.

Q. Were they saying anything that you could hear?
A. They said, "Stop that man. Stop that man."
Q. Where was the money?
A. In the bag.
Q. Where was the gun in the meantime?
A. In my pocket.
Q. What were you wearing at the time when you were in the liquor store?
A. That coat.
[Tr. 1014] Q. Is this the coat you were wearing at the time you were in the liquor store?
A. Yes.
Q. This is a black coat, who does this coat belong to?
A. Me.
Q. What did you do then when you were going up the street, going towards Massachusetts Avenue, the street between Boylston Street and Commonwealth Avenue? How far up the street did you go?
A. I don't know. There was so damn much confusion.
Q. How far up the street do you think you were?
A. A long way.
Q. Would it be a block or more than a block?
A. I don't know.
Q. Did you come to a side street eventually?
A. No answer.
Q. At the time you were going up this street towards Massachusetts Avenue, what was your gait? Were you walking or running?
A. Walking.
Q. Then what did you do?
A. What do you mean?
[Tr. 1015] Q. Did you see a police officer at any time behind you?
A. No answer.
Q. Did you see the car coming, the Roadmaster?
A. Yes.
Q. In what direction was the car coming?
A. It was coming down Commonwealth Avenue.
Q. What did you do when you saw the car coming down Commonwealth Avenue?
A. I went to the side and jumped in.
Q. What side did you jump in?

A. The passenger side.

Q. Who was driving the car? Who was behind the driver's wheel?

A. Herbie.

Q. Was there anyone else in the car?

A. No.

Q. What happened then?

A. A cop came around the side of the car. I looked out of the window. He passed the right of the car and came around this side. I didn't even aim the gun.

Q. Then what did you do?

A. I had the gun out of the window like this and I just [Tr. 1016] took a shot.

Q. How many times did you shoot?

A. Shot twice.

Q. Then what happened?

A. Herbie jumped out of the car and run; and I got the hell out of there.

Q. What happened to the policeman?

A. He fell down. I can't tell exactly what happened. I don't know myself until afterwards.

Q. When you drove off where did you go?

A. No answer.

Q. What rate of speed were you driving?

A. I don't know.

Q. Was it a high rate of speed?

A. Sometimes.

Q. Eventually did the police follow you?

A. They were behind me. I lost them for a while.

Q. Eventually did something happen? Did the car stop?

A. The car went out of gas when I turned the corner, then I coasted down the hill.

Q. On what street was that?

A. Coming down into Huntington Avenue.

Q. What happened when you got into Huntington Avenue?

[Tr. 1017] A. I hit the bus and fell out of the car.

Q. Then what did you do with the gun?

A. The gun must have fallen out when I fell out of the car?

Q. What happened to the money?

A. The money could have fallen out at the same time.

Q. What did you do then?
A. When I fell out of the car?
Q. Yes.
A. I run.
Q. In which direction?
A. I don't know. Across Huntington Avenue.
Q. Down a side street?
A. Yes, through some alley, through some barbed wire fence.
Q. Then what did you do?
A. I tried to hide.
Q. Where did you try to hide?
A. Underneath the porch.
Q. Then what happened?
A. The cops came.
Q. Did they arrest you?
A. Yes.

[Tr. 1018] Q. Ronald, I am going to show you this gun here. Do you recognize this gun?
A. Yes.
Q. Where do you recognize it from?
A. Looks like the one that I had.
Q. Does it look like the gun you used when you shot the officer?
A. Yes.
Q. Take a good look at it. Is this the gun?
A. It is the same gun.
Q. When you got into the car on Commonwealth Avenue, did you know it was a policeman that was following you and came in front of the car?
A. He had a gun out and he was wearing a uniform.
Q. Do you have a license to carry this gun?
A. No.
Q. Has this statement you have given me been a voluntary statement?
A. Yes.
Q. Have I made any promises or threats to you?
A. No.
Q. Have you made this statement of your own free will?

[Tr. 1018a] A. Yes, sir.

The Witness: End of statement.

[Tr. 1019] Q. I show you exhibit 6, Mr. Indingaro, and ask you if that was the gun shown to the defendant, Johnson, when he was asked to take a good look at it and he answered "That's the same gun."?

A. Yes, sir.

Q. Now, I show you Exhibit "A" for identification, Mr. Indingaro, and ask you if that is the coat that was shown to the defendant, Ronald L. Johnson, by Lieutenant Donovan, and he answered, "Yes"?

A. Yes, sir.

Mr. McAuliffe: May this be marked as an Exhibit, Your Honor?

Mr. Colicchio: No objection.

The Court: It may be.

(Received and marked Exhibit 19.)

Mr. McAuliffe: I have no further questions.

Mr. Balliro: I have no questions, Your Honor.

Cross-examination.

By Mr. Colicchio:

Q. Mr. Indingaro, what time was it when you took the statement?

A. About 5:50, ten minutes of 6:00 in the morning.

Q. Where was that taken?

A. At the Boston Police Headquarters.

Q. When you went into the room where defendant, Johnson, was did you immediately start taking the statement?

[Tr. 1020] A. Yes, sir.

Q. Had you been in the defendant, Johnson's presence earlier where he had received some interrogation?

A. No, sir.

Q. When you observed Mr. Johnson at this time did you observe any blood on him?

A. No, sir.

Q. There wasn't any blood on him?

A. No, sir.

Q. Did he have handcuffs on at the time?

A. I don't remember.

Q. Were there any questions asked of Mr. Johnson during this interrogation that weren't put on the record?

A. No, sir.

Q. Was there any comments made by anyone present that was not put on the record?

A. No, sir.

Q. Immediately after taking this statement did you leave the room?

A. I did leave the room immediately after taking the statements.

Q. When did you transcribe this statement?

A. About two days later.

* * * * * *

[Tr. 1052] EDWARD STOLLER.

Direct examination.

By Mr. McAuliffe:

* * * * * *

Q. And please tell His Honor and the jury what the defendant Johnson told you with reference to the amount of money he intended to get that night?

A. He said he would have a substantial amount.

* * * * * *

[Tr. 1071] CHARLES DANA KUHN.

Direct examination.

By Mr. McAuliffe:

* * * * * *

Q. Now, in the course of your official duties, Mr. Kuhn, on August the 2nd, did you see the defendant Ronald Johnson?

A. I did.

Q. Where did you see him?

A. At Station 16.

Q. What time of the day was that?

A. May I refer to my notes?

[Tr. 1072] Q. Yes.

A. From 8 A.M. in the morning until approximately 9:45 or 10 A.M.

Q. Did you make an examination of the defendant Ronald L. Johnson, and particularly his hands?

A. I did.

Q. What type of examination or test did you make?

A. I made paraffin casts of the thumb and forefingers of his left hand and right hand, and examined them later on in connection with the dermal nitrate test, the paraffin test.

Q. State to his Honor and the jury what a paraffin test is?

A. A paraffin test is a test which consists of the making of casts, paraffin casts, wax casts, of the digits, the thumbs and forefingers in particular, of a person's hands, the examination of those casts for the presence of oxidizing residue, powder residue, from a discharge of a firearm, with a reagent known as di-phenylamine or di-phenylamine benzidine reagent.

When a blue color is obtained when applying the reagent to the casts of the hands of the individual, the location of that blue color, the characteristics of the color, that is, [Tr. 1073] whether it is a particular type of reaction or an overall reaction, is mapped and is recorded and through this an interpretation is made as to the location of the oxidizing residue on the individual's hand.

In many cases, an opinion can then be evolved from this as to whether or not this is consistent with the discharge or the handling of a firearm.

Q. Did you make such a test on the defendant Ronald L. Johnson?

A. I did.

Q. As to one hand or more?

A. Both hands.

Q. All right. Tell his Honor and the jury, please, what your test disclosed?

. . . . . .

[Tr. 1074] A. I found oxidizing residues on the hands of Ronald Johnson in both blast pattern and print pattern.

Q. What is a blast pattern and what is a print pattern?

A. A blast pattern is that which would be obtained from the discharge of a firearm. A print pattern is that which would be obtained from the handling of a firearm. It is my —may I give my opinion?

[Tr. 1075] Q. Continue as to what else you found.

The Court: What was the question now? Miss Kevill, what was the question?

[Question read by the stenographer.]

The Court: No, read the question to which the objection was withdrawn.

[Question read as follows:

"Q. Tell his Honor and the jury, please, what your test disclosed?"]

A. It is my opinion——

The Court: No.

Q. What did it disclose?

A. That is the disclosure on the test.

Q. What?

A. Blast pattern and print pattern on his hands.

The Court: Of what, oxidizing——

The Witness: Oxidizing residue, yes.

Q. What did that indicate to you, sir?

A. It indicated that in my opinion Mr. Johnson not only discharged a fireman, but also handed a discharged firearm recently.

* * * * *

[Tr. 1081] Q. Now, still talking about the defendant Johnson, have you an opinion as to when, within what period of time from the time of your examination that the defendant Johnson discharged the firearm? Do you have an opinion?

A. I do.

Q. And will you state it, please.

* * * * *

[Tr. 1082] A. Within about one day.

Q. And your examination took place at what time, on Johnson?

A. From 8.00 to 8.45 a.m.

Q. On what day?

A. August 2nd, 1963.

* * * * *

[Tr. 1338] ARGUMENT IN BEHALF OF THE DEFENDANT JOHNSON

By Neil Colicchio:

Mr. Colicchio: May it please your Honor, Mr. Foreman and ladies and gentlemen of the jury:

You have now been sitting on this case approximately two weeks. I imagine, being realistic, you are really wondering what I am going to say in my summation with reference to the defendant Johnson. You are wondering am I going to ask you to find him not guilty of the crimes he is charged with.

As his attorney, my obligation is to do what in my best judgment will be the best I can for the defendant Ronald Johnson.

I have sat here for two weeks, listening to approximately sixty-five, sixty-six government witnesses. I heard the testimony of the co-defendant Graves.

I could stand before you now and probably talk about the evidence that was offered here for a half hour, pointing out testimony of certain witnesses, but I don't intend to, because I am going to make only one request of the twelve jurors that are finally sent out to deliberate this case. I feel that if I am sincere with you in my summation, you will at [Tr. 1339] least give me some sincere consideration with respect to the request I will make.

The procedures from here on in will be my summation, summation by the District Attorney, the opportunity on behalf of Ronald Johnson to address this jury, if he so wishes, and then the Judge will charge you with respect to the law.

I am most concerned with respect to one particular phase of the Judge's Charge to you. The Judge will tell you, the twelve that are selected, that you, and there will be no others in this court room, that will be able to say when the verdict

is returned, if your verdict against the defendant Ronald Johnson be guilty of murder in the first degree, only this jury in this court room can then recommend that the defendant Ronald Johnson be sentenced to his natural life in prison.

That is the request, that is the substance of my summation. That is all that I, as the attorney for Ronald Johnson, am asking of you.

I wouldn't, after listening to all this testimony, I wouldn't now try to convince you that you should find the defendant [Tr. 1340] Ronald Johnson not guilty. I say if I were to do that, I feel that you would certainly believe that I am insincere and therefore would give me little consideration with respect to what I am asking of you.

Murder is a terrible thing. We all know that. There are no nice words that can be said about murder. As a matter of fact, even when defense counsel for Mr. Graves was making his summation, he alluded to, I think, the word "killing." There is no nice words that go with it. At this point I certainly wish I knew some nice words because I don't expect, when I sit down, there is going to be too many nice words said about the defendant Ronald Johnson. I don't expect them to be said and I know they won't be said.

I cannot make any impassioned plea, in the sense that maybe it is expected, but in looking over this jury, noticing your occupations, noticing your attitudes during the course of this trial, I feel certainly one thing, that this is an extremely intelligent jury, and, being such, I feel sure that you are going to give consideration to what I ask of you.

The District Attorney will step up and probably start right at the beginning with respect to the evidence that was [Tr. 1341] offered. He will go through all the witnesses' identification of the defendant Ronald Johnson, he will go through the robbery, will go through the shooting, he will go through the crash.

I say to you that as far as that is concerned, I am not about to try to insult your intelligence.

I say there is nobody in this court room, the judge cannot of his own volition sentence the defendant Ronald Johnson to life imprisonment. That is put in the hands of the jury. Nobody else can do it but you twelve people.

As Mr. Balliro said when he was talking with you, he

made mention of the fact that probably this will be at least as big a decision that you have ever made in your life and as big a decision as you ever will have to make. I don't think that that has to be reiterated. I am certainly sure that the twelve of you that are going to make this decision will be well aware of the gravity of it.

I thought about what I would say to this jury for two weeks, knowing that there is only one thing I can say. I am making just one request, and I wish that I could say it in fifteen ways or twenty ways, so that I could stand before you [Tr. 1342] so that you would know that I am making it in sincerity.

But there is only one way to say it, and that is just to ask you when you deliberate, think of the defendant Ronald Johnson.

As Mr. Balliro said in his summation, certainly the death of Officer O'Leary is a tragedy. No one can deny it.

So that I would now just say it once more, that when you go into that room to deliberate, I ask you only one thing, come back with a recommendation that Ronald Johnson be sentenced to prison for his natural life.

Thank you.

The Court: You may proceed, Mr. McAuliffe.

* * * * *

[Tr. 1363] Defendant Johnson: Ladies and gentlemen of the jury, Mr. Foreman: I know I have made a very, very bad mistake and I am willing to pay for it.

Going over my background a little bit—I am not very [Tr. 1364] good at speeches. I was born in Providence, Rhode Island and I went into the U. S. Marine Corps.

I was married while I was in the Marines and I have a little girl, which now is in St. Patrick's School. And when I was arrested I was beaten up by the officers and I deserved it. And then the results of that, I had a very serious brain operation on my head and till this day I regret that I ever came through it. I would have been better off if I was dead.

And the only thing—I am not very good at speeches, the only thing I am asking, ladies and gentlemen of the jury, there's two charges that you can find: one is guilty in the

first degree, which recommends the chair, the electric chair; the second is guilty in the first degree recommending clemency, which recommends life imprisonment. And I am prepared to go to jail and spend the rest of my life in prison; but I am not prepared to die.

What I am saying is not going to bring back Mr. O'Leary's life. It is hard to explain in words. My attorney, Mr. Colicchio, who was defending me; all the evidence which the prosecutor presented to you was true. There was no [Tr. 1365] sense in my taking the stand because all the evidence points to me. And I could have went on all day and probably all next week trying to prove that it wasn't; but all the evidence is there and the evidence was presented to the jury.

All that I ask is just clemency, first degree with clemency. If I am found guilty of first degree I will go to the chair. I can't express anything else. Sitting up here talking, standing up here talking about it, all I can do is express my feeling which I am very, very sorry these things happened.

I have never been in jail before in my life. I have never had no difficulty with the police. And I am willing to take my punishment. Please, if I had to, I would get on my knees to each and every one of you and beg. I put my life into your hands. Please recommend clemency, life imprisonment.

I guess that is all. Thank you, very much.

[Tr. 1366] (The Court charged the jury as follows:)

MURRAY, J. Mr. Foreman, ladies and gentlemen: You, are now nearing the end of your labors in these cases. At times I feared that some of you might be incapacitated by illness. The month of January, as we know, is a month, a dangerous month in some respects insofar as health is concerned; but at any rate a month in which many of us suffer discomfort from colds and other illnesses of that kind. And I observed that one or two of you were affected in that way. I am happy, however, to see that all of you have come through and that none of you have suffered any serious illness during this period of time.

At the conclusion of these instructions you will retire and consider and deliberate upon the evidence which has been

presented to you by these parties during the time that you have been here in attendance upon the Court, prepared to perform duties as jurors. And you will decide the issues between the Commonwealth and these defendants upon the indictments, copies of which you will have with you. Your duties will come to an end with the verdicts that you will [Tr. 1367] return.

It is important both to the Commonwealth and to each of these defendants that you reach, that you arrive at verdicts upon these issues. I think you know that the law requires that your verdicts shall be unanimous, that it shall be the verdict of each and every juror, each and every one of the twelve jurors whom by lot will remain in order to deal with the issues raised by these indictments. An agreement by a majority of the jurors is not a verdict. It is nothing that the Court can recognize as a verdict, however large the majority may be. An agreement by eleven, with one dissenter, does not constitute a verdict. A verdict must be the unanimous assent by all twelve of the jurors.

The verdict to which a juror agrees must, of course, be his own verdict, or her own verdict as the case may be, the result of his own convictions or her own convictions, and not merely an acquiescence in the judgment of others, unless assent is given. And yet it must be apparent to you that where unanimity is required, as the law does require it in the case of a verdict, it is important that in the deliberations, [Tr. 1368] each member of the jury must give earnest consideration to the views of his fellows, as he would expect that they will give to his, in order that a unanimous judgment may be reasonably arrived at upon the difficult decisions of fact which confront you.

After you have agreed upon your verdicts your decisions will be declared publicly in the verdicts which the Foreman will announce when you return once more to this courtroom. And, as I say, those verdicts must be the verdict of each and every juror as to each indictment and as to each defendant.

While it is true that these two defendants are having their cases tried together, yet it is incumbent upon you, ladies and gentlemen, to make your determination upon the charges against each, because it is your duty to return verdicts upon those charges against each defendant.

As to indictment 8478, which is the murder indictment,

which charges as follows: that "Ronald L. Johnson and Herbert Graves, the younger of that name, on the first day of August in the year of our Lord, one thousand, nine hundred and sixty-three, did assault and beat one James B. [Tr. 1369] O'Leary, with intent to murder him, and by such assault and beating did kill and murder the said James B. O'Leary," as to that indictment, with respect to the defendant Johnson, it will be your duty to return one of the following verdicts: guilty of murder in the first degree, without more; guilty of murder in the first degree but, "we recommend that the death penalty be not imposed;" guilty of murder in the second degree; or not guilty.

As to indictment #8479, the indictment which charges robbery in this language: "That on the first day of August, 1963, Ronald L. Johnson and Herbert Graves, being armed with a dangerous weapon, to wit: a revolver, did assault Jacob Berman, with intent to rob him, and thereby did rob and steal from the person of said Jacob Berman, money of the amount and of the value in all of nine hundred and sixty-six dollars, of the property of the Copley Wine Co., Inc., a corporation legally established and existing, the said Ronald L. Johnson being masked while committing the offense set forth above;" it will be your duty upon that indictment, with respect to the defendant Johnson, to return [Tr. 1370] a verdict of guilty as charged in the indictment. That will be the form of your verdict, if you determine, if it's your intention to return that verdict, guilty as charged in the indictment, or not guilty.

With respect to indictment #8483, which is the indictment charging assault and battery upon one Jacob Berman by means of a certain dangerous weapon, the charge is contained in this language: "That Ronald L. Johnson and Herbert Graves, the younger of that name, on the first day of August in the year of our Lord, one thousand, nine hundred and sixty-three, did commit an assault and battery upon one Jacob Berman by means of a certain dangerous weapon, to wit: a revolver." As to that indictment, with respect to the defendant Johnson, it will be your duty to return a verdict of either guilty or not guilty.

With respect to indictment #8482, which charges Ronald L. Johnson, on the first day of August, 1963, did unlawfully carry a certain firearm, to wit: a revolver, under his control

in a certain vehicle, to wit: an automobile, without having then and there any license, authority, appointment or permission, according to law, so to do. It will be your duty to [Tr. 1371] return, with respect to the defendant Johnson, a verdict of either guilty or not guilty.

[Tr. 1372] With respect to Indictment No. 8480, which is the indictment charging Johnson with unlawfully carrying a firearm, to wit, a revolver, without having then and there any license, authority, appointment or permission according to law so to do, it will be your duty to return upon that indictment as against the defendant Johnson a verdict of guilty or not guilty.

Likewise, with respect to the defendant Graves, you will return verdicts upon the following indictments, the verdict, as I say, to be the verdict of each and every juror, a unanimous verdict; on 8478, which is the indictment charging the defendant Graves that he did assault and beat one James B. O'Leary with intent to murder and by such assault and beating did kill and murder the same James B. O'Leary, it will be your duty to return a verdict of one of the following verdicts: Guilty of murder in the first degree, without more; or guilty of murder in the first degree but we recommend the death penalty be not imposed; or guilty of murder in the second degree; or not guilty.

With respect to Indictment No. 8479, the indictment [Tr. 1373] charging robbery as to the defendant Graves, you will return a verdict of either guilty as charged in the indictment or not guilty.

With respect to Indictment No. 8483, which charges that Ronald L. Johnson and Herbert Graves, the younger of that name, on the first day of August in 1963, did commit an assault and battery upon one Jacob Berman by means of a certain dangerous weapon, to wit, a revolver, you will return a verdict of either guilty or not guilty.

There are three verdicts to be returned against the defendant Graves. There are five verdicts to be returned against the defendant Johnson.

The total number of verdicts which you have the duty to return, obviously, then, is eight verdicts, Mr. Foreman, ladies and gentlemen.

In returning these verdicts, whatever they may be, it is your solemn duty to stand between the Commonwealth and

these defendants with absolute rigid impartiality and unflinching courage in the performance of your duty as jurors.

Only by performing your duties in that way, in accordance with law, will the truth of these matters be judicially [Tr. 1374] determined and declared, will your consciences be satisfied of the performance of the duty imposed upon you, however onerous it may be, and will justice be attained.

That, of course, is the last act, the matters that I have just referred to, the last act in the performance of your duties, the return of the verdicts.

Prior to that time, however, there will be other duties which you are expected to perform with respect to the consideration, the analysis, the evaluation, and the interpretation of the evidence which has been offered to you in this court room by these parties.

At this time I think it may be helpful to you to point out and to advise you of the respective rights and duties and the prerogatives of those parties, or those actors, in the case, and I use that in a very precise form of speech, who have appeared here in the performance of their duties in connection with the administration of justice, and by that I include, of course, your own.

[Tr. 1375] The method of trial here in the courts of this Commonwealth, in the common law tradition, upon the issues in these indictments, is based essentially upon an adversary system of opposing parties. It is the Commonwealth against the defendant Johnson, the Commonwealth against or versus the defendant Graves.

In that system of trial for the purpose of determining the truth of accusations, it is not the function of the Court or the jury to investigate and to search out the evidence and to bring it here for the purpose of consideration.

It is the parties who call the witnesses who bring forth the evidence and who seek to persuade the jury who, after all, must make the final determination as to the meaning of the evidence, who seek to persuade the jury to view the evidence in the light most favorable to the contentions that they make. And that is all perfectly proper.

But it is in this climate of partisan advocacy where one party opposes the other, where one party presents evidence for the consideration of the jury, as do the other parties or, at least, as all parties have the opportunity so to do, but it

[Tr. 1376] is in this climate that it is the duty of the jury to discover and to announce the truth or the matters of fact upon the issues confided to them for their consideration and decision.

In this case, the parties have been represented by learned and able counsel, and I am happy to take this opportunity to say that. They have performed their duties with conspicuous ability, with industry, and with fidelity to the clients that they represent, the Commonwealth represented by the District Attorney and the two defendants who are here in the court room before you.

It was the right of counsel to object to the introduction of evidence offered whenever in their judgment they deemed it to be in the best interests of their clients or in accordance with the rules of law to raise the objection and have the Court rule upon it. It was the duty of counsel for the defendants to request that exceptions be taken to the rulings of the Court, if the rulings were adverse to the contentions which they made. That is all in accordance with tradition [Tr. 1377] and it is in accordance with a high tradition and the best tradition of a trial bar, and no inferences adverse to either party, the Commonwealth or to the defendants or either defendant, should be drawn by you, ladies and gentlemen, because of the fact that you have witnessed that here in the court room before you.

Likewise, no inferences should be drawn adverse to any party here, the Commonwealth or either defendant, from the requests that were made from time to time by one or more of the attorneys for a conference to which the jury was not a party at this end of the bench.

Perhaps in a case of this character, a capital case, such conferences may take place more often or may be permitted to take place more often than in other cases, but it is important, where there is a difference of opinion between the parties with respect to a particular piece of evidence, or a particular question, that discussion concerning the respective views of the parties take place not in the presence of the jury, it not being the function of the jury to make any [Tr. 1378] rulings upon the question of law.

At the very outset of this case, there was an opening made by the District Attorney, outlining what he expected to prove through the witnesses he proposed to call. At the

conclusion of the Commonwealth's case, there likewise was an opening made by counsel representing the defendant Graves. It was perfectly proper for both to present to you a statement of what each expected to offer to you in the nature of evidence from the testimony of witnesses which he proposed to call to support the case which he outlined to you.

Each counsel, I remember, as I think you will, pointed out to you that what he was saying to you was not evidence and he did not ask you to consider it to be evidence. The meaning of that, and it was properly stated to you, is that the statements of counsel are not to be added to the testimony of the witnesses and weighed with them by you as jurors in making a determination as to what took place last August 1 as you consider this evidence as you decide what it means, and as you interpret it before you return your verdicts.

[Tr. 1379] It is the proper function of an opening to outline in a general way what the case is all about in order that you may be able to follow the evidence better by a preview, a bird's eye view, so to speak, of what is to come, like a libretto in an opera or a synopsis of something that lies ahead of you for your consideration.

In the closing statements, which finished this morning, each party was entitled to ask you to view this evidence in the light in which he asked you to view it. Not that you are bound to view it that way, but each had the right to seek to persuade you by argumentation or by a process of reasoning or logic or by an appeal to your experience in order that you might view the evidence as they suggest that you should view it, from the point of view of making a decision upon the indictments affecting the client that he represented.

The personal opinions of counsel, of course, under our rules are not to be injected into the case at any stage, and I recognize, and I am quick to say, that I think all counsel were careful in that respect and avoided any attempt to [Tr. 1380] impose upon you their own personal views or opinions concerning the evidence.

If during the arguments of counsel or if during these remarks to you by the Court, I should advert to the testimony and misstate it, or state it in a manner that does not accord with your memory or recollection, you are not bound to take

it as I state it or even as counsel states it. You are expected to and should rely upon your own memory of what a witness says here or there, or the manner in which the witness testified.

The duties of counsel have come to a conclusion at this point upon the presentation of the evidence and upon the final arguments or final statements, or closing statements, however you may view it, which were addressed to you this morning.

The function of the Judge throughout the trial is to make rulings upon the admissibility of evidence offered, tested by rules and by experience, not arbitrarily, not for the purpose of favoring one party or the other, but in accordance with tradition, with rules, and with decisions that guide the Court in that respect.

[Tr. 1381] If the Court errs in making such rulings, the Supreme Judicial Court, of course, may review the rulings made and, if found to be in error, may revise the rulings or set aside any judgments based upon them.

Likewise, it is the function of the Judge to make rulings with respect to the course of the proceedings and to direct the manner in which the case shall proceed and the time at which it shall proceed, and other rulings of that nature or character that deal with the general overall progress of the case.

The last duty of the Court, in so far as the jurors are concerned, is to give them instructions with respect to the law and with respect to their duties, and it is that duty which I am engaged in carrying out at this time.

What about the functions of the jury during this period? Well, ladies and gentlemen, you are the sole judges of what took place last August 1, as a matter of historical fact. It is for you and you alone to decide judicially those facts. It is for you alone to say what were the actions and conduct [Tr. 1382] of each of these defendants from the moment that their acts and conduct became of importance, became material, became relevant, under the charges laid against them in these indictments.

It is for you and you alone to decide whether these defendants by their actions, by their conduct, coupled with their purposes and intentions, under the law committed any

or all of the crimes with which they are charged in these indictments.

That is your sole prerogative. No one, not even the Court, shares with you any responsibility or any right to participate in that judgment.

In ascertaining and in declaring the historical truth of the events in issue raised by these indictments, and in announcing the legal consequences of the findings that you make, you perform a function in the administration of justice fully as important as that of the man on the bench, if not more so. Your responsibility in a case of this character is one of the most important that can be entrusted to the citizens of this Commonwealth, for in your solemn keeping are committed grave decisions that affect the rights of the Commonwealth on the one hand and these defendants on the other.

[Tr. 1383] In reaching your verdicts, you should give your earnest, your careful, your conscientious consideration to all of the evidence which has been offered here before you, and I propose to point to the sources of that evidence at this time.

Obviously, I do not intend to summarize the evidence, and, so far as I expect, I shall avoid referring to any part of it, but I will indicate what the sources of the evidence are.

First of all, you took a view and everything you saw on that view with your own eyes and which was pointed out to you and to which your attention was directed, is evidence for your consideration in arriving at your verdicts upon these indictments. Obviously, it is not the same kind of evidence that comes from a witness on the stand, but, nevertheless, it is evidence and may be considered by you as you make your judgment as to the meaning of the testimony which you heard here on the stand.

The second most important source of evidence is the testimony of the witnesses who took the stand here before you, a group of witnesses that numbered somewhere between sixty and seventy during the period that you have been here [Tr. 1384] and following the time when the evidence first was offered to you.

Also you will have the photographs which were marked as exhibits, the several papers, the guns, and all other things and objects, the coat—I am not trying to recall them all, but

all of the things about which the Court said, "This becomes Exhibit No. So-and-So", "Exhibit No. this" or "Exhibit No. that", all of these things will be with you in the jury room. All of these things are evidence for your consideration in order that you may arrive at a just determination of the factual issues presented to you upon these indictments.

In so far as the consideration of all of that evidence is concerned, you may take into consideration such matters of common knowledge as the laws of the forces of nature. You do not leave anything outside of the jury room in so far as your own knowledge of the natural forces, the laws of nature, if they become important in helping you to understand and interpret the evidence which has been offered here to you. These include the primary laws of mathematics, the matters of common knowledge such as time, rates of speed, distances. These things which you may or may not [Tr. 1385] find you will need to apply to the evidence that you have heard, that has been presented to you, in order that you may better interpret and give meaning to it or declare the meaning that you give to it. You may consider also your knowledge of human nature and of human affairs.

You are expected and entitled to have recourse to your own experience and the common experience of mankind. You are expected to exercise your common sense and your judgment as you sift through this evidence for the truth in order that you may declare in your verdicts the legal consequences of the acts and conduct of these defendants in relation to the charges of crime laid against them.

From the facts which you find which have been established to your satisfaction by the degree of proof to which I shall shortly refer, but at this point I am going to say which you are satisfied exists by proof beyond reasonable doubt, without attempting to explain that at this point, you are entitled to make judgments, draw inferences, arrive at conclusions which logic or experience dictate or permit, as the case may be.

[Tr. 1386] In performing the function of finding the facts you are the sole judges of the credibility of the witnesses. It is for you to say which witness is to be believed or disbelieved. No one else has that prerogative and no one else

may exercise that judicial decision in so far as this case is considered.

[Tr. 1387] You have had full opportunity and fair opportunity, I believe, to observe every witness who has taken the stand here. You are entitled to use any methods, if you have any experience in so far as method is concerned, in making a judgment as to the credibility of witnesses. I rather doubt and I think it is rather unlikely, ladies and gentlemen, that any of you could have attained the stage which is apparent to me you have attained at this time without making a judgment, without having to decide at some point, whether or not you would believe one person or another on a story brought to you in your home, your place of business, your place of social activity. It seems to me at some time you have made that judgment and you are entitled to utilize the same method and the same approach here which you have previously utilized, if you have, in order to make a judgment if it becomes important with respect to the credibility of any witness.

You are entitled to take into consideration the appearance of the witness in giving testimony, the manner of testimony; you are entitled to give consideration to the qualifications of the witness which were stated. It is for you to [Tr. 1388] say whether or not the testimony of any witness was characterized by that degree of frankness, fairness, candor or accuracy which we look for and hope for when we have to make an important decision which may be based in whole or in part upon the testimony of other witnesses.

It is for you to say, and you may take into consideration, whether or not any of the witnesses were biased or prejudiced, or appeared to be; whether any of the witnesses appeared to have any motive with respect to the testimony which they gave, whether the testimony seemed to you to be frankly and honestly given; whether you decided that while the witness was honest, nevertheless, the witness was mistaken because you had the benefit of other testimony in which to make a comparison which you find more reliable. You may do all of those things with respect to the testimony that you have heard in order to make a judgment, in order to satisfy yourselves with respect to the truth of the events of last August 1.

[Tr. 1389] The fact that testimony has not been contradicted at all does not for that reason require you to accept it as credible. You still may subject the testimony of a witness whose testimony has not been contradicted to the same test that you will apply to witnesses whose testimony has been called into question. The law imposes upon you and you alone the entire responsibility of finding the facts in these cases from the evidence that you have heard and from the matters which have been called to your attention.

After you determine what the facts are, then it is for you to say in your verdict what the legal consequences of those facts are and, in so doing, and in finding the facts as well, you should put aside all considerations or factors that are non-essential in the administration of justice. You should put aside all considerations or feelings, if any you have, with respect to race or color or creed or position or anything else that is an accidental insofar as the administration of justice is concerned.

To be sure, as human beings, undoubtedly you are com-
[Tr. 1390] passionate for the fate of your fellow human beings, whether it be for Officer O'Leary who lost his life, as it has been described to you during this testimony, or for members of his family who remain as well. You are required to set aside all compassion that you may have for the tragic consequences of other human beings who are involved in the situation.

So far as you are able, you should deliberate upon this evidence and arrive at your judgments without passion, without prejudice, and without partially.

It is important that in the administration of justice, as you know, no innocent person be convicted of crime, and it is equally important that the guilty, when duly convicted after a fair trial and fair opportunity to present all proofs, shall be dealt with firmly and without unreasonable delay.

The principles of law which I now call to your attention are those matters which I ask you to keep in mind as you consider these charges.

Every one of these indictments commence with this
[Tr. 1391] phrase, "The jurors for the Commonwealth of Massachusetts on their oath present" that A.B., as the case may be, did thus and so. The indictment is an accusation made by the Grand Jury. The Grand Jury is an accusing

body. The function of the Grand Jury is not to determine innocence or guilt. The function of the Grand Jury is to say whether or not upon the matters presented to it by one party and one party only, and that is the District Attorney, that there is reasonable ground to believe that the person named in the indictment is guilty of the crime. Therefore, the accusation by the Grand Jury is not evidence of guilt, and you should keep that in mind. It is a charge made by an accusing body in accordance with the structure of government which you and I enjoy.

[Tr. 1392] At the very outset of his trial and before any evidence is offered against him, each defendant here in this courtroom is presumed to be innocent of the charges which are laid against him, upon each and every one of these indictments. The fact that he has been indicted by the Grand Jury; the fact that he was arrested; the fact that he has been held in custody since his arrest; the fact that he has been held apart in this courtroom, in a space which you have observed, are not any facts from which you may infer guilt upon the part of the defendant. These are all facts and you know they are facts; but they cannot be regarded as anything more than the procedural matters relating to the charge of crime laid against these defendants; and the manner in which assurance is given that he shall be present to answer the charge of crime. Therefore, the indictment, or the arrest and the indictment, the confinement during trial must be disregarded when you look to the evidence which has been given to you here out of the mouths of the witnesses and which you saw on the view in arriving at your conclusion as to whether or not each of these defendants, either of these defendants or both are guilty of the charges [Tr. 1393] laid against them in these indictments.

Unless the evidence establishes facts which rise above the question of guesswork or surmise or speculation or conjecture or even probability of guilt, the presumption of innocence must prevail and the defendant may not be found guilty.

The defendant, neither defendant has the burden of proving any fact here before you except when it involves one crime, which I shall deal with later on. He does not have the burden of proving his innocence. Under our system of the administration of justice, the sole party having any

burden of proving any fact here, with the exception which I have asked you to note, is the Commonwealth. And the Commonwealth has the burden of proving to you the guilt of the defendant upon the charges set forth in these indictments beyond a reasonable doubt, in order that he may be convicted of the crime charged.

You have heard that expression before and you heard it during the argument. That does not mean beyond all doubt. It is unthinkable, I think I can say, that a case can be presented to a jury so clear with respect to all of its facets [Tr. 1394] that there may not be some doubt somewhere about something; but that is not what is meant by a reasonable doubt. And the Commonwealth does not have the burden of overcoming every conceivable doubt that the human mind can conjure up.

The duty of the jury is not to look for doubts in evidence; the duty of the jury is to look for the truth. And if doubts arise in the search for the truth, and if they do not constitute what are known as reasonable doubts, insofar as the charge of crime is concerned, then they are not doubts that will prevent a jury from returning a verdict of guilty upon the charge of crime which they are considering.

On the other hand, if in the search for truth there does arise a reasonable doubt concerning any essential fact which is required to be proved, or the guilt of the defendant himself, then because of the presumption of innocence which attaches to him he may not be found guilty.

Well now, what is meant by proof beyond a reasonable doubt? In determining that fact, in determining rather what fact has been proved beyond a reasonable doubt, the im- [Tr. 1395] portant thing for you to consider is not the number of witnesses that have been called or offered, but rather it is the weight of the evidence, the strength of the evidence, the power of the evidence to induce in the jury a belief with respect to the fact which it is claimed that the evidence will support and prove. Proof beyond a reasonable doubt does not mean proof beyond all doubt, nor beyond a whimsical or fanciful doubt, nor proof beyond the possibility of innocence. If an unreasonable doubt or a mere possibility of innocence were sufficient to prevent a conviction, practically every criminal would be set free to prey upon the community; and such a rule would be wholly impractical

and would break down the forces of law and order and make the lawless supreme. A reasonable doubt does not mean such doubt as may exist in the mind of a man who is earnestly seeking for doubts or for an excuse to acquit a defendant; but it means such doubt as remains in the mind of a reasonable man who is earnestly seeking the truth. A fact is proved beyond a reasonable doubt when it is proved to a moral certainty, as distinguished from an absolute or mathematical certainty; when it is proved to a degree of certainty [Tr. 1396] that satisfies the judgment and conscience of the jury, as reasonable men, and leaves in their minds, as reasonable men, a clear and settled conviction of guilt. But if when all is said and done there remains in the minds of the jury any reasonable doubt of the existence of any fact which is essential to the guilt of the defendant on the particular charge, the defendant must have the benefit of it and cannot be found guilty upon that charge.

Proof beyond a reasonable doubt has also been explained in another way, ladies and gentlemen. It is that kind of a doubt concerning the existence of a fact which in the consideration of an important decision of a person's life prevents the person from taking the step which he has under consideration for decision.

Therefore, as you consider all of this evidence, as you consider everything that has taken place in this courtroom that may shed light upon this evidence insofar as its meaning and interpretation is concerned, if there remains in your mind a settled, lasting belief of the guilt of either defendant [Tr. 1397] upon the charges laid against him, then the Commonwealth has proved its case beyond a reasonable doubt.

The defendant Johnson did not testify in this case. He addressed you on an unsworn statement. The Court afforded him an opportunity so to do. But that is not testimony. He did not take the witness stand. The defendant Graves did. A defendant charged with the commission of a crime at his trial, during which the evidence is being offered against him in connection with the charge, is not required to take the stand. He cannot be called to the stand by the Commonwealth, by his own attorney, by the Court, by the jury, by any one. It is his constitutional right to remain silent and to require the Commonwealth to bring forth all of the evidence in the case against him.

In the exercise of that constitutional right which the defendant Johnson exercised here, no inference adverse to him may be drawn by the jury in determining whether he is guilty or innocent of the crime charged. Therefore, while you know that he did not take the stand, you may not reason that because he did not take the stand, therefore, such and [Tr. 1398] such follows as a matter of logic. That would be drawing an inference against him from that fact and you may not do that.

So far as the defendant Graves is concerned he did take the stand; and having done so and having given testimony here before you, under oath, he stands before you in that performance as any other witness whose testimony is subject to your scrutiny, your evaluation, and your judgment as to whether you accept it or reject it as it appeals to you in the light of all of the evidence that you have heard.

Insofar as the indictment charging unlawfully carrying a firearm is concerned, which is the indictment against Johnson only, and that is indictment #8480, it is a statutory crime. And the gist of the crime is the carrying of the weapon without a license, which the law requires. No person may carry upon his person a firearm, a revolver, unless having a license to do so.

In this case there is no evidence that Johnson had any license to carry the firearm when he had it on his possession, if you find he had it upon his possession when he [Tr. 1399] entered the Copley Wine and Liquor store, or when he was on any of the streets or highways of the city, if you find he had it on his person at that time.

The law provides—and this is the exception I referred to insofar as the burden on the defendant of proving anything—the law provides that a defendant in a criminal prosecution, who relies for his justification upon a license, shall prove the license. And until so proved the presumption shall be that he is not so authorized. And there is no evidence here of any license whatsoever. And if you find that Johnson had the firearm upon his person then, in the absence of any evidence of a license—and there is no evidence here whatsoever—the presumption is that he was not authorized or licensed to carry the same, and that it was being carried by him contrary to law.

With respect to the indictment charging Johnson with un-

lawfully carrying a certain firearm under his control in a certain motor vehicle without having then and there any license or authority, appointment or commission, according to law so to do, again the law requires that he who seeks to [Tr. 1400] justify the carrying of the firearm under his control has the burden of proving the license; and again if the license is not proved, the presumption is that the possession was unlawful; that the license or authorization had not been granted. And if you find here that Johnson, if you find here beyond a reasonable doubt that Johnson had under his control in the motor vehicle a revolver, or the revolver, which has been introduced in evidence, then the presumption is that he had it in his possession in the vehicle unlawfully.

The indictment charging both of these defendants with assault and battery upon Jacob Berman by means of a certain dangerous weapon, to wit: a revolver, charges a felony. An assault and battery is the unlawful, unjustifiable application of force by one person upon the person of another.

When I strike another or if a person strikes another without justification with his fists or kicks a person with his foot, or in any way inflicts force upon the other, without justification—and I am excluding surgeons now and I am excluding the football games, which are played according [Tr. 1401] to rules, where force is applied, as we know; and the surgeon applies force upon the patient when he operates; and there is justification for that, the infliction of force under those circumstances is lawful—but where there is no justification for the application of force, then you have an assault and battery, whether it's done by a gun, a knife, a hand, a foot, a bat, or whatever it may be.

This charge is that the assault and battery upon Berman was committed by means of a certain dangerous weapon. A dangerous weapon is any instrumentality which is designed, either to kill a human being or to inflict serious and great bodily harm upon him. A revolver is a dangerous weapon because it is designed to kill, designed to kill animals; it is designed to kill human beings. And, therefore, insofar as the crime of assault and battery with a dangerous weapon is concerned, insofar as the indictment 8483 is concerned, if you find that there was an assault and battery upon Jacob Berman and that the assault and battery was accomplished by striking him with the revolver, even though

it was not used, even though it was not discharged at him, [Tr. 1402] but was used to bring it down upon his head or some other part of his body, that is a sufficient proof of the charge in the indictment of assault and battery by means of a certain dangerous weapon, to wit: a revolver.

The indictment charging robbery, what must be proved there by the Commonwealth beyond a reasonable doubt? Robbery is the taking and carrying away of the personal property of another, from his person, taking it from his person or under his control, against his will, by force and violence or by assault and putting in fear, with the intent to steal that property.

In robbery it is not necessary that the Commonwealth prove that the robber was armed to make out the crime of robbery. It is not necessary for the Commonwealth to prove that the robber was masked. This indictment charges both of those, that it was armed robbery and that Johnson was masked.

If a robber is armed, then he is committing a more aggravated form of robbery than if he is unarmed; but it is robbery nevertheless if he has nothing in his hands and nothing [Tr. 1403] on his person in the form of a dangerous weapon, or a pistol, or a knife, or anything else. The crime is in taking and carrying away the personal property of another from his person, against his will, by the use of force and violence, or by putting him in fear with the intent to steal.

If you are satisfied beyond a reasonable doubt from the evidence that you have heard that—that Jacob Berman was the subject of a robbery here and that the robber was armed and that the robber, who is charged here to be Johnson, was masked, then the Commonwealth has proved the allegations of the indictment against Johnson beyond a reasonable doubt. I will deal with Graves shortly.

Insofar as the indictment charging murder is concerned, it is charged that he did assault—that Johnson and Graves did assault and beat one James B. O'Leary with intent to murder him, and by such assault and beating did kill and murder the said James B. O'Leary. Insofar as that indictment is concerned, with respect to the defendant Johnson, and Johnson only at this point, keep in mind that the unlawful killing of another with malice aforethought is murder.

[Tr. 1404] The killing of a human being may be either intentional or unintentional. If the killing is intentional, malice aforethought is implied, unless the attending circumstances of the killing reduce the crime to a crime other than murder. Let me repeat that. If a killing is intentional, malice aforethought is implied. If an unjustifiable, unlawful killing is intentional there being no justification for the killing, malice aforethought is implied, unless the circumstances attending the killing reduce the crime to a crime other than murder.

In this case, ladies and gentlemen, there is no evidence of any circumstances that would reduce the crime of the killing of James B. O'Leary to any crime other than murder. There is no evidence in this case that would warrant this jury in returning a verdict of manslaughter against either of these two defendants; and the Court would reject any verdict that was offered by this jury of that character.

What is meant by malice aforethought in connection with the definition of murder, that is the unlawful killing of another human being with malice aforethought? Keep in mind [Tr. 1405] that when the phrase, "malice aforethought," is referred to, we are not talking about an intended killing or an unintended killing. We are not distinguishing,—the Court is not distinguishing between an intended killing and an unintended killing. The Court is distinguishing between a killing accompanied with malice aforethought and a killing in which malice aforethought is absent. That is something different than an intentional killing or an unintentional killing.

I repeat what I said and I do not retract or modify it in any way that an intentional killing, an unlawful intentional killing implies malice aforethought.

So that you have both elements in the intentional,—the unlawful intentional killing. You have got the factor of the intended killing. And unless the circumstances will reduce the crime to something other than murder, you have accompanying the intentional as well the concept of malice aforethought.

Malice aforethought is a phrase that has been used from time immemorial in the common law tradition. It is an indispensable ingredient of the crime of murder. A killing

[Tr. 1406] cannot be murder unless there is malice aforethought. In the expression, "malice aforethought," malice is used in a technical sense.

When a homicide occurs, when a killing occurs, malice is manifested, if it's manifested at all, by the motives and the circumstances which attend and surround the fatal blow. Malice includes, not only the motives which spring from anger, hatred or revenge in a killer, but from every other unlawful and unjustifiable motive which it is possible for the human heart or the human mind to contain.

Whenever a homicide is shown to have been committed without justification and as a result of a deliberate act, it is sufficient proof to have been done with malice aforethought. Therefore, Mr. Foreman, ladies and gentlemen, in a case in which a homicide is an essential ingredient of the indictment laid against the defendant, as is this case in the charge of murder, it is incumbent upon you to examine the circumstances that attended and surrounded the delivery of the fatal blow in order for you to determine whether or not there is anything,—in order for you to determine first, [Tr. 1407] whether or not the killing was unlawful; and secondly, whether it was intentional; and thirdly, whether the circumstances attending the killing can be interpreted as anything other than a killing described as a killing with malice aforethought. And that is what it is the duty of the jury in this case to do, to examine the circumstances that attended and surrounded the killing of Officer O'Leary at the time and place and under the circumstances in which he was killed.

Up to this point I have said nothing about the degrees of murder. I am merely defining for you murder, pointing out what murder is and what the ingredients are. I have said also that a killing can be an unintentional killing. An unintentional killing can be murder. An unlawful, unintentional killing is murder if the killing results from the application of force by the assailant, either by the use of a dangerous weapon, a weapon capable of causing death, a weapon capable of causing great bodily harm to the victim, or if, to take another case not having any relation to the evidence here, but merely for the purpose of illustration,—[Tr. 1408] an unintentional killing by one who inflicts upon the victim great and serious physical harm, which according

to common experience and common sense is likely to produce death. If death results, the crime is murder, notwithstanding the fact that the assailant did not intend or wish or desire the death of his victim; and even under circumstances where at the moment that the force was applied he hoped that the death of the victim would not result.

An unintended killing may be murder, provided the force which brings about the killing is either delivered by a dangerous weapon, where the assailant does not intend to kill, but nevertheless uses it under such circumstances as according to common experience and common sense will likely produce death.

So that if one person shoots another, not intending to kill, intending something else, but nevertheless if the shooting is intentional, the use of the dangerous weapon is sufficient to supply the malice aforethought required; and the resulting death is murder.

[Tr. 1409] So that the question of whether or not the death of James B. O'Leary is murder does not depend upon whether the killing was intentional or unintentional. It depends upon whether or not the killing was accompanied by malice aforethought.

Now, as I say, up to this point I have not dealt with the degrees of murder, but here I shall. If the jury finds beyond a reasonable doubt that the death of James B. O'Leary was murder, whether the killing was intentional or unintentional, then the question of what degree of murder it is depends upon other factors, which I now call to your attention.

Murder committed with deliberately premeditated malice aforethought, or in the commission or attempted commission of a crime punishable with imprisonment for life is murder in the first degree. Let me repeat that. Murder committed with deliberately premeditated malice aforethought or in the commission or attempted commission of a crime punishable with death or imprisonment, rather, punishable with imprisonment for life, is murder in the first degree.

Murder which does not appear to be in the first degree is murder in the second degree. The degree of murder shall [Tr. 1410] be found by the jury.

I have already dealt with the question of malice aforethought, that expression which characterizes the circum-

stances attending the killing, that which is implied in an intended, in an unlawful intended killing where no other circumstances will reduce the crime. Deliberate premeditation is not the same as malice aforethought. There can be no murder without malice aforethought. A murder which is deliberately premeditated is murder in the first degree.

In the expression, deliberately premeditated malice aforethought, the expression which I have just read to you from the statute, the words, "deliberately premeditated," imply that the action is meditated upon beforehand, sufficiently long to form both a clear intent and the purpose to carry out the intent. No fixed period of time is required. It does not mean slowly. Deliberate premeditation means simply an action considered beforehand, thought upon and resolved beforehand. It excludes that kind of action which is taken suddenly, almost involuntarily, before there is time to think about it and determine to do it.

[Tr. 1411] Let me give you an illustration which has been referred to from time to time by the Supreme Judicial Court of this Commonwealth to describe what is meant by deliberate premeditation. "To premeditate is simply to meditate beforehand. It need not be for a long time. It merely requires time to form a clear intent, for example, a robber with a dirk or pistol turns a corner and meets a bank messenger with a roll of bills. In a moment he determines to get it. The next moment he shoots or stabs the messenger to death, takes the packages, and flees. His malice was deliberately premeditated, though it occupied only a few seconds; for it was a cool act of the will, and unlike the intent, stimulated by a sudden act or quarrel, where one kills another suddenly, not having intended violence beforehand. That is, murder committed with deliberately premeditated malice aforethought requires proof beyond a reasonable doubt of a murder committed pursuant to a purpose or plan actually formed and resolved upon before the action was taken, however short the period of time in which the contemplation occurred."

[Tr. 1412] The statute also provides that a murder committed in the commission or attempted commission of a crime punishable with imprisonment for life is murder in the first degree. The Commonwealth contends here that the murder of James B. O'Leary was committed in the commis-

sion or the attempted commission of armed robbery. Armed robbery is punishable for life in the State Prison. Whoever being armed with a dangerous weapon assaults another and robs, steals or takes from his person money or other property which may be the subject of larceny shall be punished by imprisonment in the State Prison for life. So that a murder committed in the commission or the attempted commission of armed robbery is murder in the first degree.

The evidence which has been offered here before you, and the Commonwealth has made it plain, is evidence from a great many witnesses who purported to testify as to what each saw or heard at various places in the area I think generally circumscribed, at least in the beginning, by Boylston Street, Exeter Street, Fairfield Street, Newbury Street, Commonwealth Avenue, the alleys nearby, at least in that [Tr. 1413] phase of the case which has been presented to you by the Commonwealth.

There have been witnesses who testified to a great many other things, as you know. Witnesses have testified that they heard shots fired. No witness has testified that he actually saw the shooting. The Commonwealth does not have to produce any witness who testifies here that he or she actually saw the shooting. The jury is entitled to give consideration to the evidence which is circumstantial in character which may establish that fact.

There is no question raised by the defendants here with respect to the fact that James B. O'Leary died on Commonwealth Avenue,—was killed. You have heard the testimony with respect to the cause of his death. All of that evidence you may take into consideration in making a determination as to whether or not the Commonwealth has proved beyond a reasonable doubt the charges contained in the indictment with respect to murder.

Circumstantial evidence will support a finding of murder in the first degree or any degree. Circumstantial evidence will support a verdict of all degrees of murder.

[Tr. 1414] There was evidence offered here concerning the talk that the defendant Johnson had to a witness who identified himself as an automobile salesman. That evidence was offered by way of motive, offered to the jury for their consideration in connection with motive. Motive is no part of any one of the offenses which are contained in the indict-

ments before you. The Commonwealth is not required to prove motive in the murder indictment, the robbery indictment or any indictment. However, the jury may give consideration to the motives of a person if they are satisfied of the fact by evidence beyond a reasonable doubt concerning his motives in making a determination as to the purpose or the intention of the accused or the defendant at some subsequent time.

Motive and intent are not the same. Motive is generally the driving force which produces the intention or purpose, and for that reason the evidence which has been offered concerning the conversation which Johnson had with the person who identified himself as the motor vehicle salesman may be considered by you in determining whether or not it helps to explain or interprets the conduct or the acts of the [Tr. 1415] defendant Johnson at some subsequent time.

Evidence has also been offered here to you with respect to what is called consciousness of guilt. That is, what were the acts and conduct of the persons who are here accused subsequent to the time that the crimes took place, if you find the crimes established beyond a reasonable doubt by the evidence which has been brought here before you.

Flight from the scene of a crime by an accused may be considered by a jury in determining whether or not that action upon the part of the accused is the normal or natural response which is the experience of many human beings in reacting to a situation in which they are involved or may be involved.

Consciousness of guilt must be carefully considered by a jury in determining whether or not the acts of the defendant at the time that they are being viewed have relation to the charges that are set forth in the indictments. If you find that they are, if you find that the conduct and the acts of the defendant have relation to that, you may take into consideration what they did in arriving at your judgment as to the [Tr. 1416] innocence or guilt of these defendants upon these indictments.

Up to this point I have not dealt with the question of Graves in so far as the indictments are concerned. I do so now with respect to the indictment for murder, the indictment charging robbery, and the indictment charging assault

and battery upon Jacob Berman by means of a dangerous weapon.

No person can be found guilty of a crime, whether it be the crime of murder, the crime of robbery, or the crime of assault and battery by means of a dangerous weapon, unless he commits it by his own hand—and the Commonwealth does not claim that Graves did—or unless the law imposes responsibility, legal responsibility, upon him for the acts of another with whom he is acting in concert and agreement. As I say, the Commonwealth does not claim that Graves, by his own hand, committed the murder, the robbery, or the assault and battery by means of a dangerous weapon, upon Jacob Berman. Therefore, in so far as the charges against Graves are concerned, you must give consideration to the matters which I now call to your attention.

[Tr. 1417] It is clear in the law of this Commonwealth, as it is in many other jurisdictions, that if two persons are combined together by their voluntary agreement and by their concerted action, to accomplish some criminal purpose and each is to play his part in the overall plan or scheme, then each is responsible for all of the acts committed by the other in the execution of their common purpose or design, if such acts are natural or probable consequences of the unlawful combination or undertaking or understanding between them.

If you find, ladies and gentlemen, beyond a reasonable doubt upon this evidence that there was an agreement, a common design, a plan or a purpose entered into between Johnson and Graves, then you are entitled to ask of yourselves these questions in so far as this evidence is concerned. What was it that they agreed upon? What were the matters that they had agreed to? What plans had they made to carry out their common purpose or plan? What instrumentality by way of a weapon or automobile was included in their plans, if such was included in their plans? What eventuality had they contemplated that might occur in the execution of their common purpose? What preparation, if [Tr. 1418] any, had been made to guard against any anticipated or unforeseen occurrence which might arise in the execution of their common plan or design or purpose?

I say you may ask yourselves those questions, if you

are satisfied from this evidence beyond a reasonable doubt that before anything took place here in the form of robbery or assault and battery by means of a dangerous weapon, or the killing of Officer James B. O'Leary, if you are satisfied that these parties had some agreement between them concerning their common interest, common plan, common design, common purpose. If you are satisfied beyond a reasonable doubt from the evidence that there was an agreement or plan between them, you should then determine what was the breadth, the scope, the nature of the agreement or plan between them in order that you may decide whether or not the killing of Officer O'Leary was a natural and probable consequence of that plan and the manner in which the plan was then being executed.

It is not necessary that the Commonwealth prove beyond a reasonable doubt or prove at all that murder was part of [Tr. 1419] the original plan between these two persons if you find that they had agreed upon the holdup of this liquor store, Johnson being armed and known by Graves that he, Johnson, was armed. It is sufficient to show that the murder was one of the natural or probable consequences of the crime if the jury are satisfied beyond a reasonable doubt that the defendants were engaged in the crime of robbery and that the perpetrator of the robbery was armed. I say, if you are satisfied of these facts beyond a reasonable doubt, that they had this common purpose, this agreement, then, if murder was one of the natural or probable or likely consequences of their plan, then the responsibility for the murder will be visited upon all of them, some legal responsibility.

How do you prove this, whether or not there was an agreement or plan? Well, the law is pretty clear on that, ladies and gentlemen. The agreement, plan, design or purpose, however you characterize or describe it, if any there was, and it is incumbent upon the Commonwealth to satisfy you beyond a reasonable doubt that there was, may be proved by what the defendant Graves told the police, by [Tr. 1420] what he did before Johnson entered the store, by what Johnson did before he entered the store, and by what each did before any of these crimes were committed, by what each did at the time the crimes were committed. You are entitled to draw inferences from such of these facts as

have been proved to your satisfaction beyond a reasonable doubt.

You may also take into consideration what each defendant did after the shooting in so far as it tends to shed light upon what was their agreement, if any, before anything happened.

If you are satisfied beyond a reasonable doubt from the evidence that you have heard here, and the Commonwealth has the burden of satisfying you, that if the plans were changed as they went along after the robbery took place, and the plans were such that it was a natural and probable consequence that death would ensue, or that murder would result to O'Leary, then again Graves would be responsible for the legal consequences of that death, and if the death was murder, he would be responsible for the legal consequences of the murder.

[Tr. 1421] The agreement or plan does not have to be in writing, obviously. It does not have to be expressed in any formal words such as "We agree to do thus and so", "We don't agree to do that." It is not necessary that there be any formal words whatever. It is not necessary that there be any words spoken as between those who are charged with a conspiracy or a confederation or a joint adventure.

There may be a tacit understanding among two or more persons to be gleaned by a fact finding body, such as this body, from the acts or conduct of those who are charged with the joint enterprise, by inferences that may be naturally and properly drawn from what they did under the circumstances in which they acted. But it is incumbent upon the Commonwealth, however the agreement or plan is proved, to prove it to your satisfaction beyond a reasonable doubt.

As I say, the principle is clear, as I stated to you earlier, that where it has once been proved that there is a common purpose, plan or design to commit a crime, commit a felony, [Tr. 1422] such as murder, robbery and assault and battery by means of a dangerous weapon, all three are felonies, if there is a purpose or plan or design to commit a felony such as robbery, then the acts of each done in pursuance of carrying out successfully that plan may be charged legally against all.

One thing more on that point. In these indictments, Graves is charged as a principal, a principal, not as an

accessory after the fact, not as an accessory before the fact, but charged as a principal, and I want you to keep that in mind because I suggest that there ought to be no discussion whatsoever in the jury room concerning accessory. I don't say that there will be but I point out that it might arise, and the question of accessory before the fact and after the fact is not involved here at all. Graves is charged as a principal and he is charged with sharing the responsibility with Johnson for everything that Johnson did in so far as each one of these crimes is concerned. He is charged as a principal, the Commonwealth contending that he engaged in this [Tr. 1423] common purpose, undertaking, enterprise, with Johnson and the further additional fact that he was in a position so that he could be found actively taking part in the acts and conduct of Johnson.

What do I mean by that? I say he was charged as a principal in these indictments. A person may be found to be a principal even though by his own hand he does not commit the crimes, if the jury is satisfied beyond a reasonable doubt, first, that there was that common plan, design or purpose which I have already described; secondly, that he was carrying out his part in the common purpose, plan or design, and was in a position to aid his associate either by keeping watch for his associate or in a position where he could prevent interference or detection in the carrying out of the plan, or was in a position where he could encourage his associate to the further prosecution of the plan in any manner which might aid in the furtherance of the plan, or where he can aid his associate to escape from the scene or from pursuit by a motor vehicle or by any other means. If a person is in a position to be able to render that type of aid, then he may be found to be a principal in connection [Tr. 1424] with the actual perpetration of the crime by the other.

It is not necessary to show that a person charged as a principal, who admittedly, by his own hand, did not perpetrate the crimes,—it is not necessary to show that he was an eye-witness or an ear-witness to the criminal acts if he was in a position to assist his associate in the success of the common enterprise or plan which they had theretofore made.

So that, Mr. Foreman, ladies and gentlemen, if you find beyond a reasonable doubt, and again let me say the Com-

monwealth has the burden of proving these facts beyond a reasonable doubt, that the commission or the attempted commission of the armed robbery—I will have something to say about attempted commission shortly—if you find that the commission or the attempted commission of the armed robbery was embraced within the common purpose, plan or design of these two men, if you find further that Johnson was carrying out his part of the plan while armed with a dangerous weapon and if you find that Graves was a principal, as I have defined it and instructed you with respect [Tr. 1425] to that, when the assault and battery on Berman with a dangerous weapon by Johnson took place, then Graves may be found guilty on that indictment as a principal.

If you find beyond a reasonable doubt that the commission or attempted commission of an armed robbery was embraced within the purpose or plan or design of these two men, and that Johnson was carrying out his part of the plan while armed with a dangerous weapon, and that Graves was in a position as a principal when the robbery of Berman took place while Johnson was armed, then Graves may be found guilty on that indictment.

If you find beyond a reasonable doubt that the commission or attempted commission of the armed robbery was embraced within the scope of the agreement, enterprise or common purpose or plan or design of these two defendants, and that, again, Johnson was carrying out his part of the plan while armed with a dangerous weapon, and that at the time, the agreement, plan, and design of stealing the money was still in force and effect at the time of the shooting of O'Leary by Johnson, which caused Officer O'Leary's death, [Tr. 1426] then Graves may be found guilty of murder in the first degree on that indictment.

It was argued to you that while Graves had been engaged in unlawful conduct up to that time, at the time of the shooting he had abandoned the enterprise or had been arrested, and, therefore, his participation in the common plan, purpose or design had ended before the shooting took place. If that is the fact and you are satisfied of that fact, and the defendant does not have to prove that fact, but if you are satisfied that that is the fact, and that the Commonwealth has not satisfied you beyond a reasonable doubt that the

conspiracy or plan or enterprise or design was still continuing in force and effect at that time, then the defendant Graves may not be found guilty of the shooting and the consequences of the shooting or murder.

What about abandonment? What about the doctrine of abandonment of a person who had prior thereto been engaged with another in a common plan to commit a crime? Let me call your attention to these principles. Whatever may be the other requirements of an effective abandonment after a criminal enterprise, it is certain, both as a matter [Tr. 1427] of law and of common sense, that there must be some appreciable interval between the alleged act of abandonment and the act from responsibility for which escape is sought. It must be possible for a jury to say that the accused had wholly and effectively detached himself from the criminal enterprise before the act with which he is charged is in the process of consummation, or has become so inevitable that it cannot be reasonably stayed. The process of detachment must be such as to show not only a determination on the part of the accused to go no farther, but also such as to give his co-conspirators a reasonable opportunity, if they desire, to follow his example and refrain from further action before the act in question is committed.'

A conspirator cannot escape responsibility for an act which is the natural result of a criminal scheme which he has helped to devise and carry forward because, as the result of either fear or even a better motive, he concludes to run away at the very instant when the act in question is about to be committed. While it may make no difference whether mere fear or actual repentance is the moving cause, [Tr. 1428] one or the other must lead to an actual and effective retirement before the act in question has become so imminent that its avoidance is practically out of the question.

In so far as the claim of abandonment by the defendant Graves is concerned, I repeat what I said earlier, that he has no burden of proving that to you, that the Commonwealth alone has the burden of satisfying you beyond a reasonable doubt that at the time of the shooting of Officer O'Leary there had been no abandonment of the common plan or enterprise but that it was continuing in force and effect at that point. But if you find that there was an

abandonment in accordance with the principles to which I have called your attention by the defendant Graves, or if you find that he had been then and there arrested by Officer O'Leary and was no longer in a position to render any aid or assistance to his co-conspirator Johnson, and was no longer free in so far as the furtherance of their common purpose or design was concerned by virtue of that arrest, then he may not be found guilty of the shooting or the con-
[Tr. 1429] sequences of the shooting, of murder. That does not affect his responsibility, if you find that there is any responsibility, with respect to the other two crimes.
[Tr. 1430] If the jury find guilt on the part of either defendant it is your duty to bring in a verdict of guilty of the highest crime which the defendant is found guilty beyond a reasonable doubt, and no higher crime.

When you return again to this courtroom, Mr. Foreman, ladies and gentlemen, the Clerk will ask you with respect to these eight indictments, as he calls them to your attention, in language which may be substantially as I state: "What say you, Mr. Foreman and ladies and gentlemen of the jury, with respect to the defendant Johnson? Is he guilty or not guilty on indictment #8478, charging the defendant with murder? Is he guilty or not guilty?. And the reply expected will be one or the other of those verdicts, either guilty or not guilty. And then the clerk will ask you, "Guilty of what, Mr. Foreman?" And then it is your duty, Mr. Foreman, to respond to that inquiry by stating what is the unanimous verdict of this jury upon the inquiry.

And with respect to the murder indictment, as I have already called to your attention, the verdicts which you may return against the defendant Johnson on that indictment, [Tr. 1431] are guilty of murder in the first degree; or guilty of murder in the first degree, but "We recommend that the death penalty be not imposed;" or guilty of murder in the second degree; or not guilty. With respect to the indictment charging robbery as against the defendant Johnson, one of these verdicts: guilty as charged in the indictment, or not guilty. With respect to the indictment charging assault and battery on Jacob Berman by means of a dangerous weapon, as to the defendant Johnson, one of these verdicts: either guilty or not guilty. With respect to the indictment charging the unlawful carrying of a revolver under his control in

a motor vehicle without authority so to do, one of these verdicts: either guilty or not guilty. With respect to the indictment charging Johnson with the unlawful carrying of a revolver on his person without having any permission so to do, one of these verdicts: either guilty or not guilty.

With respect to the defendant Graves, as to the indictment charging murder, one of the following verdicts: guilty of murder in the first degree; or guilty of murder in the first degree, but "We recommend that the death penalty be not [Tr. 1432] imposed;" or guilty of murder in the second degree, or not guilty. With respect to the indictment charging robbery, as to the defendant Graves, either guilty as charged in the indictment or not guilty. With respect to the indictment charging the defendant Graves with assault and battery on Jacob Berman by means of a dangerous weapon, one of these verdicts: either guilty or not guilty.

On the murder indictment, if you decide either or both of these defendants is guilty of murder in the first degree, then before deciding which of the verdicts of first degree you will return, whether guilty of murder in the first degree, or guilty of murder in the first degree but "We recommend that the death penalty be not imposed;" you will consider all of the evidence which has been offered here in this courtroom before you in accordance with this provision of law: "Whoever is guilty of murder in the first degree shall suffer the punishment of death unless the jury shall, by their verdict and as part thereof, upon and after consideration of all of the evidence, recommend that the sentence of death be [Tr. 1433] not imposed; in which case he shall be punished by imprisonment in the State Prison for life."

If after consideration of all of the evidence you are not in agreement that the recommendation for clemency should be made as a part of your verdict, the Foreman, in answer to the clerk's question, "Guilty of what?" if you have replied guilty in response to his inquiry, the Foreman should reply, "Guilty of murder in the first degree," without anything more. Then it will become the duty of this Court to impose the penalty of death.

If, on the other hand, the jury is unanimous that the recommendation for clemency should be made as part of your verdict, the Foreman, in answer to the clerk's question, "Guilty of what?" should reply, "Guilty of murder in the

first degree, but we recommend that the sentence of death be not imposed." And it will be then the duty of this Court to sentence the defendant to life imprisonment.

If the jury find the defendant guilty of murder, but not in the first degree, you will reply, Mr. Foreman, upon the inquiry of the Clerk as to your verdict, "Guilty of murder in the second degree," and no more. Nothing further re-
[Tr. 1434] mains to be done in this case but the last act in the performance of your solemn duty, Mr. Foreman, ladies and gentlemen.

Let me extend to you my appreciation and compliments for your close attention to these remarks which, as I indicated earlier, of necessity were longer than I would hope that they normally might be. And let me also compliment you for your cheerful and continued patience as this case nears its close at this time. I have observed you throughout the entire period of time that you have been here as the jurors in this case; and I am confident that now you will discharge your duties conscientiously, with intelligence, with courage, and with honor.

* * * * *

[Tr. 1467] The Court: It is considered and ordered by the Court that you, Ronald L. Johnson, suffer the punishment of death by the passing of a current of electricity through your body in the manner and at the time and place provided by law.

* * * * *

Paper No. 38

Nos. 8478, 8479, 8480, 8482, 8483 of 1964

JOHNSON'S MOTION FOR NEW TRIAL

The defendant Johnson moves that the Court grant him a new trial on Indictments Nos. 8478, 8479, 8480, 8482 and 8483 and assigns for reasons therefor the following:

1. That the Court erred in admitting into evidence the answers of the defendant Johnson to questions asked by Lieutenant-Detective John J. Donovan (See Tr. 986, 1001-1020) when said Johnson was in custody (See Tr. 406-415, 605, 782, 784, 786-789, 792, 795-796, 801-804, 843-845, 847, 1019), was not represented by counsel or granted an opportunity to consult counsel (See Affidavit attached hereto and marked "A"), and had not waived his right to counsel and had not been effectively warned of his constitutional right to remain silent (See Tr. 847, 1001-1020);

2. That the Court erred in admitting into evidence the answers of said Johnson to questions asked by Lieutenant-Detective John J. Donovan (See Tr. 986, 1001-1020) when said Johnson was in custody (See Tr. 406-415, 605, 782, 784, 786-789, 792, 795-796, 801-804, 843-845, 847, 1019) and not represented by counsel, having requested and been denied the opportunity to confer with and be represented by counsel prior to answering said questions as appears from the affidavit attached to this motion and marked "A" (a typewritten copy of which is also attached and marked "B");

3. That such errors were prejudicial and there is a reasonable possibility that said answers of defendant Johnson contributed to his conviction; and

4. That a new trial be granted in the interests of justice.

This motion is made on the basis of the papers on file in these cases, the transcript of evidence, the exhibits, and the affidavit attached hereto and marked "A", and the defendant Johnson prays for leave to introduce evidence in support of said motion.

By his attorney, /s/ John M. Harrington, Jr.

Oct. 1, 1964—Filed
Nov. 30, 1964—Hearing commenced.
Dec. 15, 1964—Further hearing on motion—continued to Dec. 28, 1964 at 11:30 A.M. Murray, J.
Dec. 28, 1964—Hearing resumed and concluded. Murray, J.

"A"

AFFIDAVIT

Aug. 4, 1964.

I, Ronald L. Johnson, being first duly sworn on oath depose and siad'' (sic)

After I was arrested on Aug. 1, 1963 I ask (sic) for a lawyer on my way to station ten.

At station ten I ask (sic) for a lawyer from the booking sergant. (sic)

At station ten when I was in a cell I ask (sic) sergant (sic) engueary (sic) for a lawyer and he laught (sic) at me.

At headquarters I ask (sic) a-lot of officiers (sic) about a lawyer and none of them said anything to me.

The first I saw a lawyer was at 8:30 a.m. on Aug. 2, 1963.

Nobody said that, I didn't have to say anything.

/s/ Ronald Johnson.

Subscribed and sworn to by Ronald L. Johnson before me this fourth day of August, 1964.

/s/ John A. Pike, Notary Public.

My Commission Expires Oct. 19, 1968

"B"

AFFIDAVIT

Aug. 4, 1964.

I, Ronald L. Johnson, being first duly sworn on oath depose and siad'' (sic)

After I was arrested on Aug. 1, 1963 I ask (sic) for a lawyer on my way to station ten.

At station ten I ask (sic) for a lawyer from the booking sergant. (sic)

At station ten when I was in a cell I ask (sic) sergant (sic) engueary (sic) for a lawyer and he laught (sic) at me.

At headquarters I ask (sic) a-lot of officiers (sic) about a lawyer and none of them said anything to me.

The first I saw a lawyer was at 8:30 a.m. on Aug. 2, 1963.

Nobody said that, I didn't have to say anything.

Ronald Johnson.

Subscribed and sworn to by Ronald L. Johnson before me this fourth day of August, 1964.

John A. Pike, Notary Public.

My Commission Expires Oct. 19, 1968

[Tr. 6] RONALD L. JOHNSON, defendant, duly sworn.

Direct examination.

By Mr. Harrington:

Mr. McAuliffe: Excuse me, Your Honor, may I address the Court?

[Tr. 7] The Court: Yes.

Mr. McAuliffe: Is there any order, Your Honor, of the Court with reference to possible witnesses being called to the stand and being present in the courtroom?

The Court: I'll hear any motion that is asked, that is presented to me in that respect. If either party desires to move in that respect I shall entertain the motion.

Mr. Harrington: I make no such motion.

Mr. McAuliffe: Then I have no objection to any witnesses being present in the courtroom.

The Court: All right, proceed.

Q. Please, state your name for the record, sir?

A. Ronald L. Johnson.

Q. And you are the Ronald L. Johnson who was a defendant in the case of Commonwealth vs. Ronald L. Johnson?

A. Yes, I am.

Q. Which is indictment numbers 8478, 8479, 8480, 8482, 8483. How far did you go in school, Mr. Johnson?

A. About the 5th grade, if I went that far.

Q. And when did you finish school, Mr. Johnson?

A. I didn't finish, I quit.

Q. Well, at what age did you quit school?

A. When I was 16 years old.

Mr. McAuliffe: I don't hear you.

[Tr. 8] The Witness: When I was 16 years old.

Q. And what grade were you in at that time?

A. Well, I was in the ungraded room. I think about the 5th grade. I am not sure.

Q. Now, were you taken into custody by police officers on the evening of August 1, 1963?

A. Yes, I was.

Q. In Roxbury, Mass. That was in Roxbury, Mass., was it not?

A. Yes.

Q. And after you were taken into custody by the police officers, where did you go?

A. Went to station 10.

Q. And what happened at the station? Were you booked at Station 10?

A. Yes, I was.

Q. And were you physically placed thereafter where?

A. Well, after I was booked I was put into a cell.

Q. And approximately how long were you in that cell?

A. Well, they kept bringing me out to take pictures. I imagine, about an hour and a half to two hours, I guess. I am not quite sure.

Q. And after the time that you were in that cell did you go some place else, some other police station?

A. Yes. They took me to headquarters.

[Tr. 9] Q. Could you keep your voice up, Mr. Johnson?

A. They took me to headquarters.

Q. And can you tell us whether or not you had conversations with police officers from time to time at headquarters?

A. Yes, I did.

Q. And can you tell us whether or not you were, from time to time, in the line-up at police headquarters?

A. Yes, I was.

Q. And did there come a time when you gave a statement to certain police officers?

A. Yes, I did.

Q. And that statement was taken down by a stenographer?

A. Well, at first—let me see. Yes.

Q. What is the answer?

A. Yes.

Q. And can you tell us approximately when you gave a statement which was taken down by a police stenographer?

A. About 4.30 in the morning, 4.30 or 6.00 o'clock, about 4.30 in the morning. It's about that. I am not exactly sure.

Q. Now, before, the night before, the night about which you have been testifying, which is August 1, the night of August 1, August 2, 1963, had you ever been in jail before?

A. No, I haven't.

[Tr. 10] Q. And——

A. Wait a minute, do you mean——

Q. I mean, a jail.

A. Like Charles Street Jail, something like that?

Q. Had you ever been in Charles Street Jail?

A. No, I haven't.

Q. Had you ever been in any other jail?

A. No, I haven't.

Q. And had you ever been in jail in any State other than Massachusetts?

A. No, I haven't.

Q. Your answer is: You have never been in a jail of any kind?

A. No.

Q. Had you ever been arrested before, Mr. Johnson?

A. Well, yes, I have.

Q. And how many times?

A. Well, one. I was driving fifteen miles over the speed limit; and that was in Foxboro, Mass.

Mr. McAuliffe: I don't get his answers.

The Court: Speak right up. I think if you stand back he might throw his voice.

Q. Talk to me back here, Mr. Johnson.

A. I was arrested in Foxboro, Mass. At the time I was [Tr. 11] living in Rhode Island. At the time I was driving fifteen miles over the speed limit. I went to Court. They put me in the police station. I went to Court the next morning. I was just fined thirty-five dollars for speeding.

Q. Other than that event, which you have just told us about, had you ever been arrested or taken into police custody before the events of August 1, August 2, 1963? If there is any other occasion, please tell us about it.

A. Another time I was picked up and I was turned loose at Station 10.

Q. And approximately when was that?

A. About nine months before the incident.

Q. Have you now told us about all of the times when you were taken into police custody or arrested prior to the events of August 1 and August 2, 1963?

A. That is about it. That is all I can remember. That is it.

Q. Now, directing your attention to the night of August 1, August 2, the night on which you were apprehended in

Roxbury, can you tell us whether or not you ever asked any one to see a lawyer?

A. Yes, I did.

Q. Can you tell us when you first asked to see a lawyer, telling us who was present on the occasion and where you [Tr. 12] were when the request was made?

A. Well, I made the first request when I entered the wagon. I asked them what was it about. And one of the guys told me, just keep my mouth shut. So, when I did get to Station 10——

Q. I want you to give me all the conversation at that time. Now, this conversation, was it or was it not in the police vehicle?

A. It was in the police vehicle.

Q. And the police vehicle had left some place, had it not?

A. Yes, it did.

Q. Where had it left?

A. It left where I had been picked up at.

Q. And can you tell us how many persons were in the police vehicle?

A. Gee, I'd say about three, two, three, maybe four. I am not quite sure, because they had me in there. I was face down when they brought me in there, the wagon.

Q. Can you tell us what you said with reference to a lawyer?

A. Well, I asked one of the guys at that time, I says, I asked him, "What's it about?" He said, "You'll find out when you get to Station 10."

Mr. McAuliffe: May that be stricken as not responsive, Your Honor?

[Tr. 13] The Court: Well, is that all?

Q. Can you give us any other conversation you had?

A. Well, I didn't say nothing else to him. I asked him, "Can I have a lawyer?" He didn't say anything. He didn't say nothing.

Q. I want you to be sure you have given us all the conversation.

A. So, from there——

Q. All the conversation. Not from there.

A. Well, I asked him, I asked him about a lawyer, but

nobody said anything, so I just kept my mouth shut and didn't say anything. Nobody said anything to me.

Q. This was when you were in the vehicle?

A. When I was in the vehicle.

Q. Do you know the names of any of the officers that were present at that time?

A. I know one of them, one of them, a colored lawyer, a colored cop.

Q. Do you know his name, sir?

A. I know him when I see him. I am not sure about his name. I know him when I see him, though.

Q. Now, have you given us all the conversation you had in the police vehicle?

A. Yes.

[Tr. 14] Q. After you left the police vehicle you were at Station 10, were you not?

A. Yes, I was.

Q. And you were brought to some place in the police station?

A. Yes, I was.

Q. Where were you brought first?

A. To the booking Sergeant.

Q. And do you know his name?

A. I don't know his name, no, I don't.

Q. And did you have any exchange of conversation with the booking, with the officer who was booking you?

A. Yes, I did.

Q. Did you have any conversation with respect to the subject of a lawyer?

A. Yes, I did.

Q. Will you tell us what that conversation was?

A. Well, I asked him, I says, "Is there any chance of me getting a lawyer?" He looked at me and just grinned. He didn't say anything. I asked him, "Even if you call him, just let the lawyer know I am down here." But nobody had said anything. He just looked at me and grinned.

Q. Was there anyone else present at that time, beside yourself and the booking sergeant?

A. Yes, there was.

[Tr. 15] Q. How many other persons?

A. Well, the station was pretty filled up; the station was pretty filled.

Q. Have you given us, or was there any other conversation than that you have just given us on the subject of a lawyer there at Station 10, at the booking desk?

A. Well, I asked him. He didn't seem to want to listen to me.

Q. No. You can't answer that way. Have you given us everything? Was there any other conversation other than that you have just given us?

A. Well, there is more to it, but not at the booking desk.

Q. I am only inquiring now, sir, about the booking desk?

A. No.

Q. Now, from the booking desk you went where in Station 10?

A. Well, I went to my cell.

Q. Did you see any persons when you were in that cell?

A. Yes, I did.

Q. Did you see any other police officers?

A. Yes, I did.

Q. Did you have any conversation with any of them with respect to the subject of a lawyer?

A. Yes, I did.

[Tr. 16] Q. Can you tell us, do you know the names, first of all how many such conversations did you have? And I am only addressing myself to when you were in a cell at Station 10.

A. Yes, I did.

Q. How many?

A. About four, four or five of them.

Q. Do you know the names of any of the officers?

A. Yes, I do.

Q. Let me ask you first, were the conversations all with the same officer or were they with different officers?

A. They were with different officers.

Q. Was there any officer with whom you had more than one conversation?

A. Yes, there was.

Q. And what's the name of that officer with whom you had more than one such conversation?

A. Officer Craigwell.

The Court: What's the name?

The Witness: Craigwell.

Q. And how many conversations did you have with him?

A. Well, a matter of minutes, you mean?

Q. No. I am asking you if you had more than one separate conversation with him on this subject?

A. Yes.

[Tr. 17] Q. I think you had indicated, yes?

A. Yes.

Q. And my question is how many conversations with Officer Craigwell?

A. About four, four conversations.

The Court: Is this with reference to a lawyer?

Q. With reference to a lawyer.

The Court: I think he ought to say. I don't know that that question is pointed at this juncture.

Q. Were all of those conversations on the same subject or were they on different subjects?

A. It was on the same subject.

Q. And what was the subject?

A. Well, I asked Mr. Craigwell, I said, "Could you get a lawyer for me?" So he said, what did I want a lawyer for. I says, "Well, I am picked up and I don't know what the charge is." So, he says, "I don't think there is any way I can help you on that."

Mr. McAuliffe: What is that again?

The Witness: He says, he doesn't think there is any way he can help me on it. So I told him if he would contact this Benjamin Chesky, I said, "Even if I don't call him, if somebody calls him he can get down here." But somebody had called him and he had left. He had walked out from where I [Tr. 18] was at. He had left. Somebody called him out.

Q. Called who out?

A. Craigwell. Officer Craigwell.

Q. Now, you have given us one conversation with Officer Craigwell. Now you said there were others?

A. Yes, it was.

Q. And they were on the same subject?

A. Yes, it was.

Q. Can you tell us what this was, the conversation which you have just described for us? Can you tell us whether

that was the first, second, third or fourth of the conversations you had with Officer Craigwell on this subject?

A. I guess that would be about the second.

Q. Can you tell us now what was said in the first?

A. Well, the first one, when he came in he asked me, "What are you doing here?" I said, "Well, you were standing out there." I said, "Everybody knows but me." So he says, "Where's the other guys?" So I told him, I said, "Look, I want to see a lawyer before I say anything." So that is when I told you before, he was called out before we finished the conversation.

Q. Now, was there anyone else present at the time of this conversation?

[Tr. 19] A. Yes, there was.

Q. There was yourself, there was Officer Craigwell, and can you identify—well, first of all, tell us how many other persons were present?

A. About six or seven, six or seven officers.

Q. Were they in your cell or outside the cell?

A. They was outside the cell.

Q. Do you know the names of any of them?

A. Yes, I do.

Q. Who were they?

A. Officer Ingenere from Station 9 was one. The other officer, Craigwell, Mr. Ingenere.

Mr. McAuliffe: What's the names?

A. Officer Ingenere was, from Station 9. He was there, the colored lawyer, the colored officer that was in the wagon when we were brought over to Station 10. He was there. He is sitting in the back row now, sitting up there.

Q. Is he in Court now?

A. Yes, he is.

Mr. McAuliffe: Will you identify him, please?

A. He is back there with his head down, the colored officer right there in the second row, in the back, right behind this first officer here.

[Tr. 20] Mr. Harrington: Will you stand up, sir? Now, that is Officer Hayes?

Mr. McAuliffe: Is that the man he is talking about? That is all I want to know.

Q. Is the gentleman who is now standing the officer whom you have testified was with you in the police vehicle going from the box to Station 10?

A. Yes, that is him.

Q. The officer who is now standing?

A. Yes.

Q. And that is the same officer who, you are testifying, was outside of the cell at Station 10 when you were having a conversation with Officer Craigwell?

A. That's right.

The Court: What's his name? Do you know?

The Witness: Officer Hayes.

The Court: Speak right up.

The Witness: Officer Hayes.

Mr. Harrington: May the record show that that is Officer Hayes, who is standing up. Thank you, Officer.

Q. Now, have you given us all of the first conversation with sergeant or with Officer Craigwell on the subject of a lawyer?

A. Well, he came back and he came back after the fellow [Tr. 21] called him. He went out and came back again. And I asked him what could he do, what could he do so far as a lawyer is concerned.

Mr. McAuliffe: I don't get this. Who is he talking about?

Mr. Harrington: I think I can clear this up.

Q. You told us that there was a conversation and Officer Craigwell was called away or, at least, he went away?

A. Yes.

Q. And he came back?

A. Yes.

Q. And you continued to have another conversation with Officer Craigwell?

A. Yes.

Q. And you were still in the cell?

A. Yes.

Q. And you have told us about that conversation?

A. No, I haven't. When he came back——

Q. Now, please, tell us what you said and what he said?

The Court: After he returned.

Q. After Officer Craigwell returned.

A. I asked him what could he do, how could he make out? And he said, he can't do nothing for me. I said, "Well, I got to have a lawyer some way." So, he got up and he walked up again, and I haven't seen him no more that night. [Tr. 22] He just got up and walked away.

Q. So, you have given us all of the conversation you had with Officer Craigwell?

A. Yes.

Q. Is there any other officer?

A. Yes, it is.

Q. With whom you had a conversation on the subject of a lawyer at Station 10 while you were in your cell?

A. Yes, it is.

Q. And you know the name of that officer?

A. Yes, I do.

Q. And what is his name?

A. Officer Ingenere.

Q. Can you tell us who was, if anyone else was present when you had the conversation with Sergeant Ingenere?

A. Well, Officer Hayes, he was there. He stayed there for a while, and Craigwell had left. Then another detective or officer from upstairs at Station 10 had came downstairs to look at me.

Mr. McAuliffe: Officer Hayes?

The Witness: No. Officer Hayes was there, but another officer from upstairs had came downstairs to look at me. He was present at the time.

Q. Do you know his name?

[Tr. 23] A. No, I don't.

Q. Was he in uniform or a plainclothes man?

A. He was a plainclothes man.

Q. And was this conversation after the conversations you have testified about with Officer Craigwell?

A. Yes, it is.

Q. Now, was there anyone there in addition to yourself, Officer Hayes and Sergeant Ingenere?

A. Yes. There was about three or four other people there, but I don't know them.

Q. You can't identify them?

A. Except for the officer that was upstairs, the one that had came down, one of the detectives, because I know him-

self myself, that is why I recognized him when he came downstairs.

Q. Can you tell us what you said and what anyone else said who was present there in this conversation on the subject of a lawyer?

A. Well, I just hollered out of my cell, I said, "Officer Ingenere, can I have a lawyer?" He looked at me and laughed. And he went out.

Q. Had you ever met Officer Ingenere before?

A. Yes, I have.

Q. You know his name?

[Tr. 24] A. Yes, I do.

Q. Did you have any—have you given us the whole conversation that you had with Officer Ingenere at that time?

A. Yes, that is about it.

Q. Did you have any further conversation at any later time with Officer Ingenere on the subject matter of a lawyer?

A. No, I didn't.

Q. Did you have any other conversations at Station 10, while you were in the cell, other than the ones you have now told us about, on the subject of a lawyer?

A. No, not that I can remember.

Q. Now, you left the cell at Station 10 at some point, did you not?

A. Yes, I did.

Q. And you were taken somewhere?

A. I was taken to headquarters.

Q. And you were put in the line-up from time to time?

A. Yes, I was.

Q. And when you weren't in the line-up, where were you at headquarters?

A. They put me in a room. I think it's robbery division in headquarters, on the same floor. They brought me in there.

Q. Same floor as what, sir?

[Tr. 25] A. Where the line-up room is.

Q. And do you know about how many hours you were in headquarters?

A. I'd say about five. I guess five hours.

Q. And you met various officers from time to time, did you not?

A. Yes, I did.

Q. And officers took you into the line-up?

A. Yes.

Q. And took you from the line-up?

A. Yes.

Q. Did you have any conversation with any officer at headquarters on the subject of a lawyer?

A. Yes, I did.

Q. How many such conversations did you have?

A. Well, that is pretty much all I was talking about was a lawyer. That was my main concern, was a lawyer.

Q. Well, can you tell us how many such conversations you had, to the best of your recollection?

A. I'd say about six.

The Court: Six what? Six officers?

The Witness: No, about six or seven conversations.

Q. Going to the first one now, can you tell us with whom that conversation occurred?

[Tr. 26] A. To who I was talking to?

Q. Yes.

A. It was an officer from robbery division. I know him, but I don't know his name. I know his face.

Q. Was he in uniform or in plain clothes?

A. Plainclothes.

Q. And where were you when you had that conversation?

A. We was in a little room they have, the teletype, down at headquarters.

Q. Was there anyone else present?

A. It was a lot of officers were there, quite a bit of them.

Q. Can you identify any others than this officer that you know but not by name?

A. Not in that little particular room at that time.

Q. Can you tell us what the conversation was? What you said and what he said?

A. Well, I told him, I says, "Now that I am down here can I have a lawyer? Is there any way possible for you to get me a lawyer?" So he looked at me and he grinned. He didn't say anything. So I says, "I got to have a lawyer some way or another." But he didn't say anything. He walked on away.

[Tr. 27] Q. Can you give us the next of these conversations?

A. Yes. I was talking to some more officers when they was bringing me out of the room, taking me back up on the

line-up. They kept taking me off the line-up and bringing me back up on there. And different officers were doing it. It wasn't always the same one. But I managed to get a word in here and there. It didn't do any good, but that is what. I wasn't talking to any one set person at the time, it was always a different officer.

Q. And what form of words did you use?

A. That I want a lawyer. Have them get in touch with my wife. Call Benjamin Chesky.

Q. And you said those words on more than one occasion?

A. Yes, I did.

Q. Apart from these assertions or requests to officers as you were going back and forth from the line up, did you have any other conversation at headquarters on the subject of a lawyer?

A. Well, after I was taken upstairs, upstairs in a room I was in up there.

Q. You had a conversation then?

A. Yes, I did.

Q. And who was present at the time of that conversation?

A. I don't know the names, but I can point them out.

[Tr. 28] The Court: You mean here in this courtroom?

The Witness: Yes, I can point them out.

Q. All right, will you please do so?

A. This first officer right here on this side here.

The Court: Will you stand up, please? Is that the man that you point to?

The Witness: Yes, it is, Your Honor.

The Court: Do you know his name?

The Witness: It begins with an "M". I don't know.

Mr. Harrington: Can we have who that is?

Mr. McAuliffe: The Commonwealth will stipulate that that is Detective McNamara.

A. There is another one right here on this side, over here on the end, this one right here, the first one on the end.

The Court: Will you stand, please? Is that the man you point to?

The Witness: Yes, it is, Your Honor.

Mr. McAuliffe: May I stipulate that that is Sergeant Cunningham?

A. This first one right here on this side here.

The Court: Will you stand, please?

A. That is not him. I couldn't see because the bars.

The Court: You don't identify him?

[Tr. 29] The Witness: No. The bars are there. I couldn't get a good description of him. There is another one, but he is not—there he is.

The Court: You may walk down to the rear of the room and point out anyone in the courtroom that you now identify.

The Witness: (At rear of courtroom) This officer right, here, Your Honor.

The Court: Will you stand, please? Stipulation?

Mr. McAuliffe: Yes. Lieutenant Donovan of Homicide.

The Witness: That is about all I can remember, Your Honor.

The Court: Well, I think it ought to appear—has he looked at every one in the courtroom?

The Witness: That is all I can remember that was upstairs in headquarters.

The Court: All right. Have him resume the stand.

Q. Now, Mr. Johnson,——

The Court: First of all, before you take up your inquiry further, have you now looked at every one here in the courtroom?

The Witness: Yes, I have.

The Court: And you have pointed out all those whom you say that you saw and talked with when you went upstairs from the line-up?

[Tr. 30] The Witness: At headquarters?

The Court: At headquarters.

The Witness: Yes. There is another one but he is not here.

The Court: I am talking about any one in the courtroom now. You identified those three who have been, by stipulation by the District Attorney, identified as Sergeant McNamara——

Mr. McAuliffe: Detective.

The Court: Detective McNamara, Sergeant Cunningham and Lieutenant Donovan. All right.

Q. Now, at this conversation upstairs, was there any person in addition to the three officers who you have identified in this courtroom, namely, Lieutenant Donovan, Sergeant Cunningham and Officer McNamara?

A. There is another one, but he is not here.

Q. Do you know his name?

A. No, I don't.

Q. And you had a conversation at which those four were present?

A. Yes, they were.

Q. And at this particular conversation to which you are now addressing yourself, was there a stenographer present?

A. No, not at this one.

[Tr. 31] Q. Was there——

A. The stenographer wasn't there.

Q. There was no stenographer?

A. No.

Q. And how long did this conversation take place?

A. About an hour and a half, two hours, maybe three. I am not exactly sure.

Q. Was this conversation interrupted by your going to the line-up?

A. No, I had already been at the line-up then, then I was upstairs for interrogation.

Q. You had been at the line-up on several occasions?

A. Yes sir.

Q. Did you go to the line-up after this conversation about which we are now talking?

A. Upstairs, you mean?

Q Yes.

A. No. I didn't go to the line-up room up there.

Q. And during this conversation with these four officers was there at any time any discussion of the subject of a lawyer?

A. Yes, there was.

Q. Can you give us the discussion which occurred?

A. Yes, I can.

[Tr. 32] Q. Please, do so.

A. Well, they was all in a room and I asked them, "Can I have a lawyer?" When I said, lawyer, one of them hauled off and hit me in the mouth and told me to, "Shut up and answer the questions." So I said, "Well, I am entitled to a lawyer, I guess."

Mr. McAuliffe: I don't get it.

The Witness: I asked him, I said, "I am entitled to a lawyer, I guess." He told me, "Just shut up and answer the questions." So we just kept on going. And I was physically beaten. And the part about a lawyer, every time I tried to open my mouth and mention a lawyer I was told to shut up.

Q. Have you given us the entire conversation on the subject of a lawyer during this conversation?

A. Well, that is as much as I could get out of my mouth at the time. I couldn't say too much because I was scared they'd hit me again. So I kept quiet.

Q. And the other subjects, just give us the other subjects that were under discussion at that meeting at which you have just described, the converstion on the subject of a lawyer?

A. What do you mean? You want to me to answer your questions on the conversation?

[Tr. 33] Q. What was the rest of the interrogation about?

A. They asked me about, where is the other man. He said that there is two other men. So I told him, I said, "There is another guy," I says, "but you didn't get him." So he says, "Can you identify——

Q. I think I am just going to ask you for the subject matter, if you can give that to me. There was a discussion about other persons. Was there any discussion about what you had been doing in the previous part of that evening? Did they ask you whether you had been at a liquor store?

A. Yes.

Q. That was one of the subjects under discussion, was it not?

A. Yes.

Q. And they asked you whether you shot a policeman?

A. Yes, they asked me that.

Q. And that was one of the subjects under discussion?

A. Yes.

Q. And they asked you whether or not you had robbed the liquor store?

A. They didn't ask me: they told me.

Q. That was one of the subjects under discussion?

A. Yes, it was.

Q. And did there come a time when you were asked questions in the presence of a stenographer?

[Tr. 34] A. Yes, there was.

Q. And were you asked some of the same questions before the stenographer that you had been asked in the meeting before the stenographer arrived?

A. Would you explain that again, please?

Q. Were you asked, when the stenographer was there, some of the same questions that you had been asked before the stenographer came?

A. It was the same questioning.

Q. In other words, they were the same questions before the stenographer was there and after the stenographer was there?

A. That's right.

Q. And did you observe whether or not the stenographer took down the questions and your answers?

A. No, I didn't, because he was sitting at another end of the table. I couldn't see what he was doing.

Mr. McAuliffe: I didn't get his answer. May I have the answer, please?

The Court: You may read it back.

(Last question and answer read by the stenographer.)

Q. How did you know he was a stenographer?

A. He had a little thing like that, something like that.

Q. And by that you are pointing to what?

[Tr. 35] A. Well, it looked like a little adding machine. That is what it actually looked like.

Q. Which the young lady is operating now in this courtroom?

The Court: The Court recognizes that he is pointing to the stenotype machine.

Q. And where were you taken after the questioning at which your answers were recorded?

A. Where was I taken after?

Q. Yes.

A. I was taken into a little room right next door, in the room that I was in, that is where I was taken at. It wasn't exactly a little room, but it was bigger than the one I was in.

Q. In headquarters?
A. Yes.
Q. Eventually you were taken from headquarters to some place else?
A. Yes.
Q. And where were you taken from headquarters?
A. Station 16.
Q. Station 16?
A. Station 16, yes.
Q. And did you see a lawyer when you were at Station 16?
A. Yes, I did.
[Tr. 36] Q. Had you seen a lawyer when you were at headquarters?
A. No, I hadn't.
Q. At what time did you first see a lawyer at Station 16?
A. I'd say about 8.30, about 8.30, quarter to 9.00, somewhere in the vicinity.
Q. In the morning?
A. Yes.
Q. And that is after the statement?
A. Yes.

Mr. Harrington: I have no other questions, Mr. McAuliffe.
The Court: Who was the lawyer you saw at Station 16?
The Witness: Lawyer Lewis.
The Court: Do you know his first name?
The Witness: No, I don't, Your Honor.

Cross-examination.

By Mr. McAuliffe:

Q. Mr. Johnson, you were asked about the various times that you had been arrested by your lawyer, is that right?
A. Yes, I was.
Q. And you mentioned a place, one place as Foxboro?
A. Yes.
Q. That was a speeding violation?
A. Yes, it was.
Q. And another place was Station 10, is that right?
A. Yes.
[Tr. 37] Q. And that is about all, you say, to use your words, "That is about all the times," that you were arrested, is that right?

A. No. I was at Station 4. When you say, "Arrested," I don't know if that means, go to Court or what.

Q. You understood the question of your lawyer, didn't you?

A. When I say, "Arrested,"—I don't understand what you mean when you say, "Arrested." That means, going to Court or just taken down for questioning?

Q. Let me make it plain. Your lawyer asked you, first of all, if you had ever been in jail before. Did you understand that question?

A. Yes, I think so.

Q. What was your answer?

A. I said, "No."

Q. All right. And he asked you if you had ever been arrested before, is that right?

A. Yes.

Q. Did you understand that question?

A. I am pretty sure I did.

Q. Well, is there any doubt in your mind now?

A. Well, yes, there is a couple of them. When you say, in jail.

Q. I didn't mention the word, "jail," at all. I simply [Tr. 38] repeated the question your lawyer asked you as to whether or not you had been arrested before. Do you understand that?

A. I think so. I think so.

Q. You think you understand it?

A. Yes.

Q. Well, when your lawyer asked you the question, what did you understand it to be?

A. Well, in other words, if you are arrested, you go into a police station and they take and lock you up and they book you and you go to court.

Q. That is what you understand?

A. Yes.

Q. I see. Well now, the Foxboro incident, you were taken to Court?

A. Yes, I was.

Q. What was the second incident you told him about at Station 10?

A. Down at Station 10.

Q. Pardon?

A. I say I was taken to Station 10.

Q. Did you tell him the other time you were picked up, you were turned loose at Station 10, about nine months [Tr. 39] before is that what you told your lawyer?

A. No, I didn't.

Q. That isn't what you said here?

A. I don't think I even mentioned that.

Q. Mentioned what?

A. What you are talking about. I think I did. I am not sure. I think I did.

Q. How do you want to leave it?

A. Yes, I believe I told him.

Q. Your answer now is, you believe you made that answer, is that right?

A. I believe I did make that answer.

Q. You believe you did. And that was Station 10?

A. Yes.

Q. And who picked you up?

A. The same detectives that came down to Station 10 the night I was arrested.

Q. Who are they?

A. I don't know his name.

Q. Are any of them here in Court?

A. No.

Q. Are they the same ones that turned you loose?

A. Yes.

Q. How long did they hold you?

[Tr. 40] A. They just brought me in and held me about two hours and turned me loose.

Q. Did you sign a release?

A. I think so. I am not sure. I think so, I am not sure.

Q. You are not sure whether you signed a release or not?

A. No, I am not.

Q. And that was nine months before the night that you were picked up in connection with this shooting of a police officer, is that right?

A. I am not sure whether it's nine months or what it is.

Q. Approximately nine months?

A. What I am saying, yes.

Q. Take a look at that, will you please?

A. Some of it I can't understand.

Q. Do you recognize it?

A. I recognize it, but there is a lot of it I can't understand.

Q. Do you recognize the signature here?

A. Yes.

Q. Whose signature is that?

A. It's mines.

Q. You signed that?

A. It's mines, yes.

Q. On February 5, 1963, is that right?

A. Yes.

[Tr. 41] Q. And you had been arrested for suspicion of armed robbery, is that right?

A. That is what they said.

Q. Well, that is what you were arrested for. That is what they told you?

A. Yes.

Q. How long did they hold you?

A. They just held me for a few hours.

Q. By a few hours you mean what? How many?

A. I'd say about three hours. Then they turned me loose.

The Court: Speak up. Raise your voice.

A. About three hours and they turned me loose.

Q. And you signed this release on the 5th day of February, 1963, is that right?

A. That's right, yes.

Q. And Sergeant Ingenere was one of the arresting officers?

A. Yes, he was.

Q. And Borque and Faherty. Did you know those officers?

A. No, I don't.

Q. But you knew Sergeant Ingenere?

A. Yes, I do.

Q. But you didn't tell His Honor about this incident when you were asked to tell how many times you were arrested, did you?

[Tr. 42] A. Well, there is a lot that I forget. I can't remember everything.

Q. There's a lot you have forgot?

A. I can't remember everything.

Q. Well, tell us about some more of them.

A. That is all I can remember right offhand. That is all I can remember right offhand.

Mr. McAuliffe: I am going to offer it.
Mr. Harrington: All right, no objection.
Mr. McAuliffe: I offer this, Your Honor.
The Court: It may be marked.

(Received and marked Commonwealth's Exhibit #1.)

The Court: You may proceed.
Mr. McAuliffe: Would Your Honor care to look at it?
The Court: Yes. You may proceed.

Q. Some time were you arrested in Providence Rhode Island?
A. Yes, I was.
Q. And during what period of time were you a resident of Providence, Rhode Island?
A. Oh, twenty-eight years.
Q. Twenty-eight years. How old are you now?
A. Thirty.
Q. So that up until two years ago you were a resident of Providence, Rhode Island. Is that a fair statement, sir?
[Tr. 43] A. I was, yes.
Q. Had you been arrested down in Providence, Rhode Island?
A. Well, I have been picked up down there.
Q. Were you arrested?
A. And booked, you mean?
Q. Yes.
A. No.
Q. And taken to Court?
A. Yes, I have.
Q. Well, which is it, yes or no?
A. I have been picked up without being taken to Court.
Q. And you were also picked up and taken to Court?
A. Yes.
Q. And what were you taken to Court for in Providence, Rhode Island?
A. One time I turned on my gas in my house without authority.
Q. Yes. What else?
A. And another time for fighting.

Q. For fighting?
A. Yes. I slapped a girl. I was fined ten dollars.
Q. Yes. Anything else?
A. And for assaulting a police officer.
Q. Taken to Court for that?
[Tr. 44] A. Yes, I was.
Q. Did you have a lawyer represent you?
A. Yes, I did.
Q. And what was your lawyer's name?
A. I can't think of it right off the bat.
Q. Pardon?
A. I can't think of his name right offhand.
Q. Did you go to trial?
A. Yes, I did.
Q. And how long did the trial last?
A. I imagine about a week.
Q. About a week.
A. Yes.
Q. And what was the disposition of the case?
A. Not guilty.
Q. You were found, not guilty, after a week's trial?
A. Yes, I was.
Q. And you were charged with assault on a police officer?
A. Yes, I was.
Q. And were you also arrested in Providence for the charge of assault with a dangerous weapon?
A. I can't remember offhand.
Q. You don't remember offhand?
A. I can't remember offhand.
[Tr. 45] Q. Are there any other arrests in Providence, Rhode Island, that you haven't told us about?
A. Not that I can remember.
Q. Well, how many of these occasions that you were arrested in Providence, did you go to Court?
A. For turning on the gas, I went to small Court. I was just fined fifteen dollars.
Q. When you say, "small Court," you mean, Municipal Court?
A. Yes.
Q. You were arrested for defrauding the gas company?
A. I turned on the gas in the house.
Q. What were you charged with?

A. What do you mean? When I was fined?

Q. No. The charge. What was the charge against you that you went to Court on?

A. Turning on the gas. That is all I know. I just pleaded guilty to the charge. That is all.

Q. You just pleaded, guilty to the charge?

A. Yes.

Q. Didn't have any lawyer on that one?

A. No.

Q. What other occasion, if any, did you go to Court on in Providence?

A. Well, I slapped this girl.

[Tr. 46] Q. Pardon?

A. I slapped this girl during the time I was in the service, and I was fined ten dollars for it.

Q. What were you charged with? Assault?

A. Assault.

Q. Any weapon involved?

A. No.

Q. You went to Court on that?

A. Yes.

Q. And was there a trial?

A. No, sir. I went to small Court. I can remember I went to small Court and they put me on probation till the time I left to go back to the base.

Q. Did you plead, guilty, or not guilty?

A. I pleaded guilty.

Q. And you were put on probation?

A. Yes.

Q. How long were you on probation?

A. Well, the Judge told me that he would leave me on probation until the time I leave there to go back to camp. So I left within a week.

Q. When was that, by the way?

A. When was it?

Q. Yes. What year?

[Tr. 47] A. About 1963.

Q. 1953?

A. Yes.

Q. Were you also arrested in Providence, charged with disorderly conduct, a fight in a barroom?

A. I can't remember. You've got to refresh my memory on that. That is a long time ago.

Q. 1959. Does that help you?

A. I can't say that it does.

Q. Pardon?

A. I said, I can't say that it does.

Q. All right. Well, you have had a lawyer represent you on other occasions, haven't you?

A. Where? Providence?

Q. Providence and Boston.

A. Down in Providence it was just one lawyer.

Q. When you went to Court?

A. Yes.

Q. And were on trial for a week?

A. Yes.

Q. Now, did you attend the Roger Williams Junior High School?

A. Yes, I did.

Q. Well, that is a high school?

A. It's a junior high.

[Tr. 48] Q. And what grade were you in when you left that school?

A. I was in about the fifth or sixth grade.

Q. You mean there is a fifty grade in a junior high school?

A. I was in an ungraded room.

Q. As a matter of fact, the grades there are from the seventh to the ninth.

A. The ungraded room doesn't count. The ungraded room doesn't go with the rest of the classes.

Q. Now, on August 1 of 1963, you have told us how you were brought to the booking desk, is that right?

A. Yes, I did.

Q. And Lieutenant Richardson was one of the officers at the booking desk, was he?

Mr. McAauliffe: Stand up, Lieutenant Richardson, please.

A. I can't really placed him.

Q. You what?

A. I said, I can't rightly place him.

Mr. McAuliffe: Is Sergeant Chalpin here?

The Court: Do you see the person standing?

The Witness: Yes, I do, Your Honor.

The Court: You have no difficulty seeing him?

The Witness: I can't place him, Your Honor.

The Court: All right.

[Tr. 49] Q. You saw him testify in the trial last January, didn't you?

A. Yes, I did.

Q. You also saw Sergeant Chalpin testify——

A. I don't know the officers by their names.

Q. You don't know them by their names?

A. Some of them, I do; and some of them, I don't.

Q. Well, you were told by the officers at Station 10, when you were at the desk, that you had a right to use the telephone, isn't that right?

A. No, I was not.

Q. Weren't you shown that at Division 10?

A. No.

Q. Were you asked to sign that because you refused to use the telephone?

A. No, I was not.

Q. You were not?

A. No.

Q. Well now, you were taken out from under a porch, a stairway, on the night of August 1, is that right, sir?

A. Yes, I was.

Q. By two officers, is that right?

A. It was one officer and a dog. The other officer was out in the street and he called them.

[Tr. 50] Q. One officer and a dog?

A. That's right.

Q. And you were underneath this porch, no question about it?

A. That's right.

Q. And you said to the officer, did you not, "What do you want me for? I only snatched a bag." Is that right?

A. No, I did not.

Q. What did you say?

A. He came over.

Q. What did you say to him?

A. I asked him, "What's this all about?" And he said, "You'll see when you get to Station 10."

Q. Did you ask him for a lawyer then?

A. Not at that time I was in the yard.

Q. But the officer that arested you, you asked him that you wanted to see a lawyer?

A. When we was in the car, in the wagon. I asked for a lawyer.

Q. You weren't in any wagon, were you?

A. I say, car, station wagon, wagon.

Q. You were in an automobile.

A. I said, wagon. I don't know what it was.

Q. It wasn't a police wagon, was it?

A. I can't rightly place, right offhand.

[Tr. 51] Q. Officer Hayes was one of the officers in this vehicle, whatever it was?

A. Yes.

Q. Is that right?

A. Yes.

Q. And you say you asked him for a lawyer, that you wanted to see a lawyer?

A. Yes, I did.

Q. Where was it that you first asked any one that you wanted a lawyer?

A. When I was in the automobile.

Q. Well now——

Mr. McAuliffe: Will you step to the other side of the bench, Your Honor?

The Court: Yes.

(Bench Conference, recorded as follows:)

Mr. McAuliffe: Before I ask these questions, Your Honor, and I propose to offer this in testimony later, and in view of the vulgarity involved I thought I should take it up with the Court, because, in substance, I am going to examine him upon evidence that I propose to put in later, if it should become material, that he called the police officers a lot of m . . . r-f . . . g cops, that he knew his rights; he didn't [Tr. 52] have to talk to anyone if he didn't want to talk to them; and he didn't have to answer their questions; and if they wanted to know his name or address, "Check it, look it up." And that he refused to sign the document I just showed him; and that he called Officer Hayes a black b . . . d; he was no better than the white officers; he was going to report him to the NAACP.

In view of the nature of it I thought I would take it up with the Court first.

The Court: Is there any objection.

Mr. Harrington: I gather that there is going to be cross-examination as to whether he said these words and with respect, I have no objection based on it being vulgar. I may have other objections, as you ask the questions.

The Court: All right, go right ahead.

(After Bench Conference.)

The Court: We'll take the morning recess.

(Recess, 11:40 a.m.)

(After recess, 11:58.)

(The defendant was brought in.)

RONALD L. JOHNSON, resumed:

Cross-examination.

By Mr. McAuliffe (cont.):

Q. Wasn't much of a ride in this vehicle that you went [Tr. 53] to the station house from where you entered it, was it?

A. That I couldn't tell you.

Q. That is the first time, you say, you asked for a lawyer, right?

A. Well, when I was in the vehicle I asked for a lawyer.

Q. And Officer Hayes was one of the officers, was he?

A. Yes.

Q. Can you tell us any other officer that was in there?

A. No, I don't.

Q. The officer that arrested you, rather the officer that took you out from under the porch, was he in the vehicle?

A. That I don't recall.

Q. Was Mr. McNamara here?

A. Was he where?

Q. Was he in the vehicle going to the station?

A. Not that I can recollect.

Mr. McAuliffe: Will you stand up, Officer? The other officer.

Q. Was this officer in the vehicle?
A. I don't know. I can't remember a lot of their faces.
Q. How many were there?
A. I'd say about three, four.
Q. Three or four?
A. I am not sure on that.
[Tr. 54] Q. I see. Now, I think you told us that when you got to Station 10 they started to book you?
A. Yes.
Q. And you don't recall seeing Lieutenant Richardson there, whom I asked to stand up before recess?
A. Lieutenant Richardson?
Q. I asked the gentleman to stand up and I called for Lieutenant Richardson before recess, do you recall that?
A. No, I don't.

The Court: Let him look at him again.

Q. This gentleman here?
A. No, I don't recall him. There was a lot of faces down at Station 10.
Q. As a matter of fact, he talked with you in the guard room, didn't he, at Station 10?
A. Not that I can remember now.

The Court: You may be seated.

Q. When you were being booked were you in the custody of officers?
A. The colored officer over there had me by one arm, because I was handcuffed in the back. There was quite a few officers and photographers in the place at the time.
Q. And by the, colored officer, you mean, Officer Hayes?
A. Yes.

[Tr. 55] Mr. McAuliffe: Stand up, Mr. Hayes.

Q. That man?
A. Yes.
Q. And I understand that you——

The Court: Where was this.

Q. At the desk where you were being booked?
A. I asked for a lawyer there.
Q. Who did you ask?

A. I asked the guy that was behind the screen.
Q. That was the man that was booking you?
A. Yes.
Q. And how long did this booking process take, would you say?
A. Oh, not long.
Q. They asked you your name?
A. Yes.
Q. Did you give it to them?
A. Yes, I did.
Q. Did you give it to them as soon as they asked for it, did you?
A. Yes.
Q. Did you give your address to them?
A. Yes, I did.
Q. Did you tell them to go and check it?
A. No, I didn't.
[Tr. 56] Q. Did you tell these officers you knew your rights, you didn't have to give them information?
A. No, I didn't.
Q. Didn't you also tell them you didn't have to talk?
A. No, I didn't.
Q. Didn't you also tell them you didn't have to answer questions because you knew your rights?
A. No.
Q. Did you call the officers any names, the officers that were booking you?
A. No, I didn't.
Q. Didn't you call them a lot of m . . . .r-f . . . . .g cops?
A. No, I did not.
Q. Didn't you call Officer Hayes here a black b . . . . .d?
A. No, I didn't.
Q. Didn't you tell him you were going to report him to the NAACP?
A. No, I did not.
Q. Well, outside of you giving your name and address, as you say you gave, and asking for a lawyer, what else was said by you or by the officer booking you?
A. Well, one officer told another to take everything out my pockets and that was turned in.
Q. Yes.
[Tr. 57] A. Then from there I was taken over near the

door where you go into the cells and they was taking pictures of me.

Q. Yes. That is before you entered the cell?

A. Yes.

Q. But at the booking desk have you told us everything that took place?

A. Pretty much as I can remember.

Q. Well now, when you were put in the cell—strike that, please. Who accompanied you to the cell, do you know?

A. No, I don't know the officers.

Q. One Officer?

A. No, I guess there was a whole bunch of them down there. The place was swarming with newspaper reporters.

Q. I am only talking about the police officers. How many accompanied you to the cell?

A. I couldn't recollect.

Q. In the cell, you say, you saw a Mr. Ingenere?

A. That's right.

Q. And you asked him for a lawyer?

A. That's right.

Q. What did he do?

A. He looked at me and walked away.

Q. Did he laugh at you?

A. He turned his head as if he was trying to ignore me.

[Tr. 58] Q. Well, this is your signature, is it not, sir?

A. I can't read that there.

Q. Well, isn't that your own handwriting?

A. As I say, I don't know what it is. I can't say.

Q. Did you sign a paper at some time for your lawyer or for Mr. Pike, who is here?

The Court: Mr. Pike?

A. Yes.

Q. Did you?

A. Yes.

Q. Is that the paper you signed or is that a copy of it?

Mr. McAuliffe: May we have the original, please?

The Court: What are you referring to, the affidavit?

Mr. McAuliffe: Yes, Your Honor. There were signatures on it.

Q. Do you recognize that?

The Court: The Pike you refer to is a Notary Public, I take it?

Mr. Harrington: I will stipulate that John A. Pike is a Notary Public, and his signature appears thereon.

Mr. McAuliffe: And the statement was signed in his presence?

Mr. Harrington: I will stipulate that that is true; or he is here to testify if there is any question about it.

[Tr. 59] A. Yes, that is my signature.

Q. That is yours. I see.

The Court: You are now examining the affidavit annexed to the Motion for New Trial, so that we will know what papers are being examined?

Mr. McAuliffe: Yes.

A. Yes, I can pretty much—

Q. Read it over. Take your time now.

A. Yes.

Q. Right?

A. Yes.

Q. Well, did Mr. Ingenere laugh at you when you asked him for a lawyer?

A. He turned his head and grinned and walked away.

Q. He turned his head and grinned and walked away?

A. Yes.

Q. Now then, you were taken to headquarters, is that right?

A. That's right.

Q. And you say, if I understood you correctly, that you were in a robbery room, or you talked to a lot of robbery officers?

A. Well, I was in robbery division. It was on the first floor right across from the line-up room.

Q. You were in the line-up division?

[Tr. 60] A. That is where I was brought into when I came into headquarters.

Q. You knew that this was a robbery division?

A. Yes, I did.

Q. Had you been there before?

A. Yes, I had.

Q. How often?

A. I was down there one time.

Q. Just one time?

A. One time.

Q. And when was that previous to this particular night of August 1, was it that you were in that robbery room?

A. I was down there, I'd say, about five months before I was arrested. I was in that room.

Q. Five months before you were arrested for this offense you were in that room?

A. Yes, I was.

Q. Now, talking about this night of August 1, or the early morning of August 2, 1963, were you also placed in a cell?

A. At headquarters?

Q. Yes.

A. No, I was not.

Q. At no time you were in a cell?

A. No, I wasn't.

[Tr. 61] Q. You told His Honor that at various times you were brought out to the line-up?

A. From in that room.

Q. From in that room?

A. That's right.

Q. And you were brought out by police officers?

A. That's right.

Q. Can you tell us any of the police officers that were there by name?

A. I know one of them.

Q. Who?

A. I don't know his name, but I know him when I see him; and the reason I know him is because he used to go into the Celebrity, not the Celebrity, the Cafe on Blue Hill Avenue.

Q. What's the name of it?

A. Club Savoy.

Q. But you can't tell us his name?

A. I don't know his name.

Q. Is he a white man or a colored man?

A. No, he is white.

Q. He is one of the officers?

A. Yes.

Q. Would you recognize him if you see him?

[Tr. 62] A. Yes, I would.

Q. Did you ask him for a lawyer?

A. Yes.

Q. Just how did you put it to him?

A. I asked him, "How's chances of getting a lawyer?"

Q. And what did he say?

A. He didn't say anything.

Q. Up to this time, every one that you asked for a lawyer didn't say anything?

A. Nobody said anything.

Q. Now, when you were taken out to the line-up that was just a short distance from the robbery room, is that right?

A. Yes.

Q. You were put in the line-up with several other men?

A. Yes, I was.

Q. Colored men and white men?

A. Yes.

Q. And let's go back to Division 10, were you brought out of the cell at one time in Division 10 and somebody looked at you, some civilian looked at you?

A. The only time I was brought out at Station 10 was to take pictures.

Q. You saw Mr. Megna testify in the trial, didn't you?

A. Mr. Megna?

[Tr. 63] Q. Yes.

A. Which one was that.

Q. Well, a man that identified you on Newbury Street and at the automobile on Commonwealth Avenue, do you recall that?

A. Yes, I remember him.

Q. And you saw him at Division 10, didn't you?

A. I did not.

Q. As a matter of fact, you were brought into the guard room at Division 10 in the presence of Mr. Megna, were you not?

A. I never seen him. I never seen him.

Q. And further, sir, he identified you as a man he saw running alongside of the car, his car, is that right?

A. If he did it, sire, he didn't do it in my presence.

Q. He didn't?

A. No, he didn't.

Q. Well, as a matter of fact, you were asked at Station 10 this question, were you not, rather—strike that. As a

matter of fact, you said to Mr. Megna at Division 10: "Did you see me shoot the cop?"

A. No, I did not.

Q. And didn't he say, "I didn't say that, but you were the only one there"?

A. No, I did not.

Q. You say that didn't take place at Division 10?

[Tr. 64] A. I don't remember saying nothing. I don't even remember seeing Mr. Megna.

Q. All right, sir. You gave your answer. And didn't Mr. Megna further say, "I first saw that car on Commonwealth Avenue when the police officer ran after the man;" and that, "This was the car that the man got into"? Did he say that in your presence?

A. No, he didn't.

Q. And weren't you asked this question: "What have you got to say?" And you answered this, looking at Megna, "If there was more than one colored fellow standing up, would you pick me out?" And Megna said, "I would pick you out." Did that take place?

A. I don't remember even seeing Mr. Megna.

Q. Well, did it take place with reference to any person at Division 10?

A. The only thing, they brought me out for was to take pictures.

Q. Did you ask anybody any questions at Division 10, any person, civilian, who was brought before you?

A. No.

Q. And didn't you also say to this man, "If there were ten colored fellows, the same build, the same height, you would be able to pick me out?" And Megna said, "I didn't [Tr. 65] pick out your face, I picked your build."

A. No, I didn't.

Q. Didn't that take place at Division 10?

A. It could have taken place, but I didn't see him.

Q. You mean, you may have said that to somebody?

A. No. I didn't say that. I said, if he was there, I didn't see him. The only thing, I was brought out for, was for the photographers to take pictures.

Q. Well now, when you were brought out to the line-up you made some statements to the police officers and to witnesses who were called before you, didn't you?

A. Yes, I did.

Q. And the same gentleman, Mr. Megna, made statements with reference to seeing you on Commonwealth Avenue, did he not?

A. No, he didn't.

Q. And didn't Lieutenant Donovan say to you, "Mr. Johnson, you heard what this man said. What have you got to say about it?"

A. No, he didn't.

Q. And didn't you answer: "I said it when I was down at Station 10; and another thing if he was a long way from that car, how did he spot me?" Did you make that statement?

A. No, I did not.

[Tr. 66] Q. Weren't you also asked, "Have you got anything else to say?" and you answered, "Not right now"?

A. No.

Q. All right, sir. Do you recall a lady by the name of Mary Taylor, Mrs. Mary Taylor, who testified at the trial?

A. I don't remember them, a lot of them names. If you could refer me to what she said I could probably.

Q. Do you remember any lady who testified at the trial that you saw at the line-up?

A. No, not right off hand I can't.

Q. Well, as a matter of fact, this lady, Mary Taylor, who testified at the trial, said, you resemble the man she saw running on Newbury Street. Didn't a lady at the line-up say that to you?

A. At the line-up?

Q. Yes.

A. Not that I can recall offhand.

Q. Well, what do you mean you can't recall it? You have a pretty good memory as to what took place this night, haven't you?

A. At the time of the line-up I was standing up there, bleeding like a stuffed pig.

Q. You were bleeding like a stuffed pig, is that right?

A. Yes, I was.

[Tr. 67] Q. Well, some of the witnesses that were called before the line-up didn't identify you, did they?

A. Not that I can remember.

Q. You can't remember.

A. Not that I can remember, I said.

Q. What do you mean by that? What do you mean?

A. Well, when I was up before the line-up some people did come in, but there was a lot of them. I couldn't see their faces because of the light.

Q. You heard them talk, didn't you?

A. I couldn't make sure who was talking. I couldn't hardly see the faces.

Q. Well, irrespective of whether or not you can tell us the identity of who was talking, some of these people didn't identify you, did they?

A. I guess not. I don't know.

Q. What is your memory?

A. Like I said, I couldn't see their faces, a lot of them that came up there. I couldn't see their faces. I could hear voices.

Q. Some of the voices didn't identify you, did they?

A. That I can't be sure of, because there were a lot of detectives sitting there at desks.

Q. A lot of them, sitting at desks?

[Tr. 68] A. A lot.

Q. A desk as big as this? There were a lot of detectives?

A. It looked more like, as the small school desk.

Q. Like the small school desk. And there was a lot of detectives sitting there, is that right?

A. When I come into the line-up, that is what I could see. That is what it appears they looked like.

Q. Did you ask one lady, "Are you sure it was me"?

A. I don't know actually. I couldn't say anything. Every time, if I tried to say something, I was told to shut up.

Q. At the line-up you were told to shut up?

A. Yes, I was told to shut up.

Q. You want to leave it with His Honor here that you said nothing at the line-up to people who were brought in to look at you?

A. The only thing I could do was keep my mouth shut.

Q. So you said nothing. Is that the way you want to leave it?

A. That is about it.

Q. What do you mean, "That is about it"?

A. I couldn't say anything.

Q. You don't remember saying anything?

A. At the line-up, no.

[Tr. 69] Q. But you remember what you said to these officers when you were arrested in the car and at Division 10 and at headquarters? You remember that, don't you?

A. Yes, I do.

Q. Was there a stenographer at the line-up that you saw at this desk?

A. I didn't see any one.

Q. Did you see any one taking down notes?

A. I didn't see any.

Q. But you did see a stenographer later on upstairs?

A. Yes.

Q. And you said he had one of these machines?

A. I said he had one of them that looks like this.

Q. He didn't have a notebook in his hand?

A. I couldn't see everything he had because he wasn't sitting with me.

Q. One of the officers that you asked for a lawyer is Officer Craigwell?

A. Yes, I did.

Q. Had you known him for some time prior to August 1?

A. Yes, I did.

Q. How long had you known him?

A. I'd say about a year, a year and a half.

Q. About a year. How well did you know him?

[Tr. 70] A. I knew him quite—I knew him quite long, about a year, a year and a half.

Q. See him quite often during that year?

A. Yes, I do.

Q. Now, you asked him, you have testified several times, for a lawyer?

A. Yes, I did.

Q. And did he make any answer to you?

A. He said there wasn't nothing he could do.

Q. He said there was nothing he could do?

A. He said there wasn't nothing he could do.

Q. And you have identified Officer Craigwell here in the courtroom?

A. Yes, I have.

Q. Well now, let's go back, Mr. Johnson, last year, 1963, you were questioned by Providence Police Officers in connection with a hold-up?

A. At where?

Q. Well, you tell me, any place?

A. I was questioned by the Providence Police in Boston. They said that my car was involved in an accident.

Q. What sort of an accident?

A. They said, a car accident.

Q. A car accident?

[Tr. 71] A. That's right.

Q. The Providence Police, that is all they wanted to question you about was a car accident, is that right?

A. Well, yes, that is all it was at the time.

Q. Well, all right. At some other time what did they question you about?

A. In Boston?

Q. Any place, Boston, Providence or any place?

A. Well, in Boston, they came here to Boston. I was in the Club Savoy, and when I came out, when I was getting ready to come out the door, some guys told me there was some detectives out there looking "at your car." I said, "I don't know what the heck they want out there." I went out to see. They were looking around the car to see if there were fresh bruises.

Q. Who were they?

A. Detectives from Rhode Island.

Q. Do you know their names?

A. No, I don't.

Q. How many of them?

A. I think it was two.

Q. Pardon?

A. I think it was two.

Q. You think it was two?

A. Yes.

[Tr. 72] Q. That all took place out in Roxbury?

A. Yes.

Q. That is the only place they questioned you?

A. They asked me if I wanted to come down to headquarters. I said, "Do I have to?" They said, "No." I said, "I'll come any way." So I went down there.

Q. To Boston Police Headquarters?

A. To headquarters.

Q. And you were questioned there?

A. That's right.

Q. By Providence Detectives?

A. That's right.

Q. Did Boston Detectives also question you?

A. No, they didn't.

Q. Where were you questioned at police headquarters?

A. Right in that little robbery room.

Q. And you later left there, did you?

A. Well, they turned us loose.

Q. They turned you loose?

A. That's right.

Q. Did they question you down in Providence last year, 1963?

A. When I was going fishing.

Q. My question is: Did they question you?

A. Yes, they did.

[Tr. 73] Q. Where did they question you?

A. They questioned me at headquarters in Providence. Then from there——

Q. All right now. At headquarters in Providence what were they questioning you about there?

A. They said something about a robbery.

Q. They said something about a robbery?

A. Yes.

Q. What else did they say?

A. That is all I can remember. They said something about a robbery, and took me downstairs, locked me up, brought me back up again, asked me the same questions.

Q. How long did they keep you there?

A. Till about 9:30.

Q. And what time did you get there?

A. What time did I get where?

Q. Get there. You said they kept you locked up until 9:30, is that right? From what time?

A. I don't get your answer.

Q. You say the Providence Police questioned you in Providence, is that right?

A. Yes.

Q. What time did they start questioning you, approximately?

A. Well, as soon as I got to the station.

[Tr. 74] Q. What time was that approximately?

A. It was in the evening, about 4:30.

Q. 4:30?

A. About 4:30.

Q. And how long did they question you?

A. I'd say, roughly till about 9:00, about 9:30.

Q. About 9:30. And they locked you up, did they?

A. They took me downstairs, locked me up.

Q. What time did they take you downstairs approximately?

A. I can't remember the time.

Q. Approximately how long after they questioned you did they take you downstairs?

A. They kept bringing me up and down. I can't remember.

Q. What happened? Were you arrested?

A. No. They took me from there to State Police Barracks in Scituate.

Q. That is here in Massachusetts?

A. No, Scituate at Rhode Island.

Q. You spent some time there, did you?

A. Till the morning.

Q. You mean you were locked up in the barracks?

A. Yes.

Q. Then what happened?

A. They turned us loose the next morning.

[Tr. 75] Q. They turned "us" loose?

A. They turned me loose.

Q. They turned you loose down at the barracks?

A. Yes.

Q. Did you sign a release when they turned you loose?

A. Yes, I did.

Q. Well now, when you were taken upstairs did you also ask for a lawyer upstairs, did I understand you to testify?

A. Upstairs where?

Q. In Police Headquarters?

A. Yes, I did.

Q. Who did you ask there?

A. I asked the lieutenant, the first one right here.

Q. Mr. Cunningham? Excuse me, Mr. McNamara?

A. Yes, I did.

Q. And who else did you say?

A. Everybody that I pointed out in this courtroom that was at headquarters at the time.

Q. And they didn't say anything?

A. They told me that I wasn't allowed to see a lawyer.
Q. Who told you that?
A. Mr. McNamara.
Q. Mr. McNamara told you you were not allowed to see a lawyer?
A. I was not allowed to see a lawyer until after I was [Tr. 76] interrogated.
Q. First time you told that to anybody is when you signed this statement, isn't it?
A. Signed what statement?
Q. That I showed you a short while ago.

Mr. Harrington: There have been a couple of statements shown this witness. I suggest, perhaps, which one?
Mr. McAuliffe: I'll withdraw it.
I have no further questions.

Redirect examination.

By Mr. Harrington:

Q. Mr. Johnson, Mr. McAuliffe asked you if you ever stated to the police that you knew your rights. In connection with that question did anyone at headquarters tell you you did not have to answer the questions they asked you?

Mr. McAuliffe: I pray Your Honor's judgment.
The Court: He may answer.

A. No. Nobody said nothing about that.

Mr. Harrington: I have no other questions.
Mr. McAuliffe: I have nothing further.

The Court: Does the moving party have any more evidence for the consideration of the Court?
Mr. Harrington: No, Your Honor.
The Court: Mr. McAuliffe?
Mr. McAuliffe: Mr. Hayes, please.

* * * * *

[Tr. 83] Q. Whether or not Johnson was told of his right to use the telephone at the booking desk, was he?
A. Yes, he was.

Q. Who told him?
A. I believe it was Lieutenant Richardson asked him.
Q. Asked him?
A. Yes.
Q. Just what did he say to him?
A. Vaguely, if I can remember, he used some profane language. I doubt if he ever gave him an answer.
Q. Who didn't give an answer?
A. Mr. Johnson.
Q. What did Lieutenant Richardson say to him?
A. He asked him if he wanted to use the telephone.

[Tr. 110] POLICE LIEUTENANT JAMES B. RICHARDSON.

Direct examination.

By Mr. McAuliffe:

* * * * * * *

Q. Tell us, if you will please, what took place at the booking desk while you were at the booking desk and Johnson was in front of the desk being booked?
A. I informed Mr. Johnson of his rights to use the telephone. I took out that slip and I showed him, gave him his rights, and I told him that he had the right to call his attorney, bail commissioner, friends or family, under 276, 33a of the General Laws. He told me that he was signing nothing for any m----r f------g cops, that he knew his rights.

* * * * * * *

[Tr. 117] POLICE SERGEANT JOHN CHALPIN.

Direct examination.

By Mr. McAuliffe:

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Q. Were you present when Lieutenant Richardson had any conversation with Johnson at the booking desk?
A. Yes sir.

Q. Tell us what took place.

A. He was brought to the desk in front of Lieutenant Richardson; and the Lieutenant notified him and showed him the form to sign for the use of the telephone to notify, either an attorney, or to arrange for bail, or to notify the friends or family.

Q. What did Johnson say, if anything?

A. Well, then he told him he wasn't signing anything for any m-----r f-----g cops; and he knew his rights.

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[Tr. 118] Q. Now, did you take up the booking after Richardson left?

A. Yes sir.

Q. And what took place?

A. Then we tried to calm him down, to get the information from him relative to his name and his address, his height and weight, and so forth.

Q. What did he say?

A. Well, it took a little time. We were trying to calm him down a little bit. It took about fifteen to twenty minutes before we got all the information that we wanted.

Q. And did he say anything to you with reference to his rights or anything to that effect?

A. No. He just kept cursing, using the same words that I have used previously.

[Tr. 119] Q. Did you hear him say anything to Officer Hayes?

A. Yes.

Q. What.

A. He told him, he says, "What the hell you trying to do. I am going to notify the NAACP that you are sticking up for these people instead of your own kind."

Q. Well, when he asked you—when you asked him for his name and address, did he say anything other than give his name and address?

A. He said, he knew his rights and he wasn't going to tell us cops anything.

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[Tr. 131] HAROLD T. STAPLETON, duly sworn:

Direct examination.

By Mr. McAuliffe:

Q. Your full name, sir?
A. Harold T. Stapleton.
Q. Where do you live?
A. 64 Westglow Street, Dorchester.
Q. And your occupation?
A. I am a stenographer at Boston Police Headquarters.
Q. Employed by the Boston Police Department?
A. Yes, I am.
[Tr. 132] Q. In a civilian capacity?
A. Yes, sir, I am.
Q. In the course of your official duties, Mr. Stapleton, did you go to Division 10 on the night of August 1, 1963?
A. Yes, sir, I did.
Q. And did you see the defendant Johnson there?
A. Yes, sir, in the early morning of the 2nd.
Q. On the early morning of the 2nd?
A. Yes, sir.
Q. At Division 10?
A. Yes, sir.
Q. I see. And whether or not a man by the name of Mr. Megna was brought into the presence of the defendant Johnson?
A. Yes, sir, he was.
Q. And whether or not he, Megna, made a statement?
A. Yes, sir, he did.
Q. And whether or not Johnson made any comment or statement following a statement made by Mr. Megna?
A. Yes, sir, he did.
Q. And will you tell His Honor just what it was?
A. No. I could briefly. Mr. Megna said, in the presence of Mr. Johnson, that Mr. Johnson was the man that he saw going along, I believe it was, Newbury Street while Mr. Megna was in a car; and that on Commonwealth [Tr. 133] Avenue he saw Mr. Johnson get in a car and he saw, I believe, the driver jump out after the shooting; and that Mr. Johnson turned to Mr. Megna and said, "Are you sure I am the person?" And Mr. Megna, I believe, said

something about, "I did not identify your face, just your body." And Mr. Johnson said something similar to, "Well, if there were ten men in this line-up, ten colored men in this line up, could you pick me up?" Mr. Megna said, "Yes, I could pick you out. I picked out your body, not your face."

Q. Did you hear the defendant Johnson make any other statement?

A. To the best of my recollection that is all I remember right now.

Q. I show you this, sir, and ask you whether or not—read that please and see whether or not it refreshes your recollection?

A. From the beginning, sir?

Q. Read any part you want and see whether or not it refreshes your recollection?

Mr. Harrington: To himself?

Mr. McAuliffe: Certainly.

Q. Read it to yourself. Does it refresh your recollection?

A. Yes, sir, it does.

[Tr. 134] Q. What, if anything, was said by the defendant Johnson or Mr. Megna in Division 10, in addition to what you have told His Honor?

A. Mr. Johnson asked him: "Did you see me shoot the cop?" And Mr. Megna said, "I didn't say that, but you were the only one there." Mr. Johnson said, "But you said you saw me shoot the cop." Mr. Megna said, "I didn't say that."

A. And then he was questioned by Lieutenant Donovan again.

Q. Well, following that did the defendant Johnson say anything?

A. Lieutenant Donovan asked him if he heard what Mr. Megna had to say; and he said, yes, he did. And he asked, "If you have anything else to say?" He said, "I wasn't there. I wasn't there." And he was asked if he was on Newbury Street. He said, "No, I wasn't there."

Q. Anything else?

A. That is about all he said, sir.

Q. Well, I ask you to read this, to see if that refreshes your recollection as to anything further being said by the defendant Johnson?

A. Lieutenant Donovan asked him if he had anything to say; and he looked at Megna and he said, "If there were [Tr. 135] more than one colored fellow standing up here, would you pick me out?" Megna said, "I would pick you out." Johnson said, "Ten colored fellows, the same build, the same height, would you be able to pick me out?" Megna said, "I didn't pick out your face, I picked your build."

Mr. McAuliffe: You may inquire.

Cross-examination.

By Mr. Harrington:

Q. Now, Mr. Stapleton, you are a civilian employee of the Police Department?

A. Yes, sir, I am.

Q. And consequently, you don't wear a uniform?

A. No, sir, I do not.

Q. And on the night of August 1, August 2, 1963, you were not wearing a uniform?

A. No, sir, I was not.

Q. And you have testified about—is it your memory—of conversations which you heard on that night of August 1, August 2, 1963, is that right?

A. It was the early morning hours of August 2nd.

Q. Beginning at what time, sir?

A. At 12:45 a.m., sir.

Q. And continuing until when?

A. I was only in the man's presence three minutes, sir.

Q. Is that the only time on all of August 2nd you were in [Tr. 136] the man's presence.

A. Yes, sir, it is.

Q. Had you been in his presence on that part of the evening which was August 1st?

A. I didn't see the man on August 1.

Q. Where is your place of duty normally?

A. I work out of Homicide Unit at Police Headquarters.

Q. And befoe you arrived at Station 10, is that where you had been on the night of August 2?

A. No, sir, I was at home.

Q. And you came in from your home to Station 10?

A. Yes, sir, I did.

Q. And that was at approximately 12:45?

A. No, sir.

Q. At what time?

A. Roughly around 9:30 or 10:00 o'clock.

Q. And you were at station 10 from 9:30, is that correct?

A. Yes, sir, I was.

Q. Or 10:00 approximately?

A. Yes, sir.

Q. And who asked you to come to Station 10?

A. I was called in by some officer from, I believe, the turret, notified me at home to report to Station 10.

Q. And the turret is some place at headquarters?

[Tr. 137] A. Yes, sir, it is the radio room upstairs.

Q. And you were at Station 10 then from approximately 9:30 or 10:00 o'clock to what time?

A. I'd say around three in the morning, sir.

Q. And you took down the statements of various persons?

A. Yes, sir, various witnesses.

Q. But you were in Johnson's presence for only three minutes?

A. Yes, sir.

Q. And at the time you were in Johnson's presence, where were you and where was he?

A. We were in the guard room of Station 10.

Q. Was he in the guard room when you arrived in the guard room?

A. I believe he was, yes, sir, he was.

Q. And did he stay in the guard room after the statement or did you leave the guard room?

A. I left the guard room, sir.

Q. Leaving Johnson still in the guard room when you left, after the statement?

A. I believe he was, because I walked right out.

Q. And he was in the guard room when you got there?

A. I feel certain he was, yes, sir.

Q. And where had you been just before that?

A. I was in the Captain's office.

[Tr. 138] Q. And when you came into the guard room, beside Johnson who was there?

A. There were other officers.

Q. How many?

A. I don't know, sir.

Q. Do you know the names of any of them?

A. No, sir, I do not.

Q. Did some one ask you to come to the guard room?

A. Lieutenant Donovan.

Q. Was he with you?

A. He was the interrogator. He was with me. He asked the questions, sir.

Q. So that, in the guard room, beginning at 12:45, there was the defendant Johnson?

A. Yes, sir.

Q. And Lieutenant Donovan?

A. Yes, sir.

Q. And a Mr. Megna?

A. Yes, sir.

Q. And yourself?

A. Yes, sir.

Q. And a certain number of other officers?

A. Yes, sir.

Q. And would that be of the order of ten other officers?

[Tr. 139] A. I don't remember how many there were there, sir.

Q. And have you related the entire conversation?

A. To the best of my recollection, yes, sir.

Q. You have told us everything you heard said by Lieutenant Donovan?

A. Yes, sir.

Mr. McAuliffe: I pray Your Honor's judgment.

The Court: He may answer.

A. There, yes, sir.

Q. Well, were you in the presence of both Lieutenant Donovan and Johnson at any other time that evening?

A. No, sir, I was not.

Q. So, this was the only time you were in the presence of Johnson and Lieutenant Donovan?

A. Yes, sir.

Q. And you weren't in Johnson's presence with anyone else that evening?

A. No, sir.

Q. And you have given us everything that you heard Lieutenant Donovan say?

A. Yes, sir.

Q. And you have given us everything that you heard Johnson say?

A. Yes, sir.

[Tr. 140] Q. And you have given us everything that you hears Mr. Megna say?

A. Yes, sir.

Q. And did you say anything?

A. I said nothing, sir.

Q. Now, you took some notes?

A. Yes, sir, I did.

Q. And did you take them on a stenotype machine?

A. No, sir.

Q. On what form of transcript apparatus did you take it?

A. Shorthand. I wrote them in a notebook.

Q. And where in the guard room was Johnson when you were taking down this conversation?

A. He was standing aside of a desk and, I believe, there were two officers, one on each side of him at the time I walked in.

Q. Was it the booking desk?

A. No, sir, it was not.

Q. He was standing, you say, alongside a desk. Was there someone seated at the desk?

A. No, sir. It is a large desk. It is about as tall as this and he was standing about at this corner here: and I walked in from about that gate over there. I walked right directly to him with Lieutenant Donovan and Mr. Megna.

[Tr. 141] Q. Now, was anyone sitting down?

A. That I don't know, sir.

Q. Well, was Johnson sitting down?

A. No, sir, he was not.

Q. Was Lieutenant Donovan sitting down?

A. No, sir.

Q. Megna?

A. No, sir.

Q. And were you sitting down?

A. No, sir.

Q. Where were you? Were you standing in front of Johnson or behind him?

A. In front of him.

Q. And where was Lieutenant Donovan standing?

A. In front of him.

Q. And where was your transcription note book?

A. In my hand, sir.

Q. Was it resting on anything?

A. No, sir, it was not.

Q. So, you were holding it at what height on your person?

A. Just hold it up there and write on it, sir.

Q. You weren't introduced to Johnson?

A. No, sir, I was not.

Q. You weren't identified to Johnson?

[Tr. 142] A. No, sir.

Q. And you didn't say anything to him?

A. No, sir, I did not.

Q. Well, to make sure, the only persons whom you heard say anything to Johnson in your presence were Lieutenant Donovan and Mr. Megna?

A. Yes, sir.

Q. Did you observe the witness Johnson at the time you were taking down these, what was being said, in shorthand?

A. I just looked at him, that is all, when I walked in.

Q. Did you see the back of his head?

A. No, sir, I could not.

Q. Just saw the front?

A. That is all, sir.

Q. Did you see any blood on the part of him you could observe?

A. I don't remember any blood, sir.

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[Tr. 145] Police Officer Henry Coyne.

Direct examination.

By Mr. McAuliffe:

* * * * *

Q. Did you take him into custody?

A. Yes, sir, myself and another officer.

Q. Did you also accompany him to the police box at Brigham Circle?

A. Yes, sir, I did.

Q. What, if anything, did Johnson say to you or to other police officers as you were bringing him to the police box?

A. Well, he was struggling all the way from the porch.

Q. My question is: What did he say, if anything?

A. He was calling us, m . . . . r-f . . . . g cops and white sons of b . . . . . s. And he said he didn't have to tell us anything; he knew his rights.

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[Tr. 157] POLICE OFFICER RICHARD MILAN.

Direct examination.

By Mr. McAuliffe:

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Q. Were you present when Lieutenant Richardson and Sergeant Chalpin booked him?

A. Yes, sir, I was.

Q. What, if anything, did you hear Lieutenant Richardson say to Johnson?

A. He offered him, at first Lieutenant Richardson came into the guard room and asked him how he received his injuries. And I believe he stated he was in an automobile accident.

Q. That is your best memory as to what he said?

A. Yes, sir.

Q. And then?

A. And then Lieutenant Richardson started to book him.

Q. That was at the booking desk?

A. At the booking desk.

Q. What was said by Lieutenant Richardson and what was said by Johnson?

A. Lieutenant Richardson offered him this piece of paper informing him of his rights to use the telephone.

Q. Did he tell him who he could call?

A. He told him he could call his lawyer, his friends or [Tr. 158] relatives.

Q. Yes.

A. And Mr. Johnson stated, "I am not signing any f . . . . g thing and you police can't make me sign it. I know my rights."

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[Tr. 166] Police Officer John Steele.

Direct examination.

By Mr. McAuliffe:

A. Officer Coyne and Wagner were pulling him up from the ground.

Q. And was there some sort of a porch there?

A. There was a porch, yes, sir.

Q. And was he taken from there, the rear of 20 Fenwood Road?

A. Yes, sir, he was.

Q. To where?

A. He was taken from there to 46 Box, Brigham Circle.

Q. And were you accompanying him all during this time?

A. I was, sir, yes.

Q. At any time did he make any requests for an attorney?

A. No, sir, he didn't.

Q. Did he say anything, either to you police officers or to any members of the public there?

A. Yes, sir. He was excited and violent. I remember him saying, "I know my rights. I am not going to tell you f . . . . . g cops anything." And he was yelling at some of the public, too.

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[Tr. 205] Police Officer William R. Thrall.

Direct examination.

By Mr. McAuliffe:

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Q. And were you attached to the same squad at Boston Police Headquarters on the morning of August 2, 1963?

A. I was.

Q. And were you there, sir, when this defendant Ronald L. Johnson was brought there by officers from Station 10?

A. I was.

Q. And did you see the officers who testified here?
A. I did.
Q. Are they the officers who brought him?
A. They are, yes, sir.
Q. And who else was with you at the time that he was brought in?
[Tr. 206] A. There was Detective Crisp, John Donnelly, Miller, Martin, Carter.
Q. Who?
A. Martin Carter.
Q. Carter?
A. Yes, sir.
Q. I see.
A. There was quite a few of them there.
Q. Now, who had custody of him while he was there?
A. Well, I had the cell block. I had prisoners in the cell block for the line-up when they brought him in.
Q. I asked you who had custody of him?
A. Division 10 brought him in; and then when they came in I told them, set him in the robbery squad in a chair in there.
Q. Was he under your supervision?
A. Yes, sir.
Q. And what time was that, sir?
A. About ten minutes after 3:00.
Q. And at various times was he brought out to the line-up?
A. I think he was taken in the line-up twice.

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[Tr. 218] POLICE OFFICER CHARLES W. MILLER, JR.

Cross-examination.

By Mr. Harrington:

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Q. Do you know the names of the members of the Homicide Unit who took him upstairs?
A. No. There were so many of them there that night I couldn't specifically state which ones took him upstairs.

Q. How many officers were there who comprised this corridor?

A. I'd say there's probably a dozen or fifteen of us. I can give you some of the names, but all of them I do not know.

Q. Was that a dozen or fifteen on each side?

A. No, sir.

Q. In the aggregate?

A. I'd say, probably about three at the swinging doors and then there were probably ten or more in the corridor on the other side of the swinging doors.

Q. That would be something on the order of five on each side?

[Tr. 219] A. No. I'd say there was probably three at the swinging doors and probably ten or more on the other side, blocking the corridor.

Q. This was a corridor of officers, was it not?

A. Yes, sir.

Q. So, Johnson passed between a line of officers?

A. Right, sir.

Q. So, there was a line on each side of him?

A. Yes, sir.

Q. And the aggregate, there were what? How many officers were forming that corridor?

A. I would say, three on one side and there was probably ten on the other. They don't necessarily have to be lined up abreast. Some of them were behind one another or in the middle. They weren't lined up directly abreast.

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[Tr. 229] DETECTIVE JOHN J. DONNELLY.

Cross-examination.

By Mr. Harrington:

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Q. How many officers were in the room of the robbery squad?

A. Seven or eight.

Q. Were they all from the robbery squad?

A. Well, most of us were in the robbery squad. There were others of us in and out at times; but we were all [Tr. 230] there. The robbery squad was all called in.

Q. How many officers were in the corridor?

A. Dozens.

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[Tr. 234] Detective Alan J. Crisp.

Cross-examination.

By Mr. Harrington:

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Q. Did you see the back of his head?

A. I imagine I did. I don't recall whether I paid any attention to it or not.

Q. You did see his face?

A. I saw his face, yes, sir.

Q. Was there any blood on it?

A. No, sir.

Q. And you are quite clear about it?

A. I am pretty sure I didn't see any blood.

Q. How about his neck or chest?

A. I don't recall seeing anything out of the way about his neck or chest either.

Q. Apart from, out of the way, did you see any blood around his neck or chest?

A. I didn't see any blood around his neck or chest.

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[Tr. 237] Police Officer Matthias W. Casey.

Direct-examination.

By Mr. McAuliffe:

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Q. Do you know this defendant Johnson?

A. Yes, sir.

Q. And at some time did you have occasion to have him in your custody?

A. Yes, sir. I arrested him for a motor vehicle violation in 1956.

Q. And where was that?

A. On Route 1 in Foxboro, sir.

Q. And as a result of your arresting him, did you take him to your police station?

A. I did, sir.

Q. And did you have some talk with him there?

A. Yes, sir. Upon——

The Court: All right. You have answered the question.

[Tr. 238] Q. Your answer is yes. And what did you say to him and what did he say to you?

A. Well, I asked him for his license and registration, which he gave to me; and upon giving me these papers he observed a picture on the back wall of the station, on the bulletin board, which portrayed myself.

Q. No. He saw a picture.

A. He saw a picture on the wall.

Q. What did he say, if anything, with reference to that picture?

A. When he saw the picture, he said, "You're another one of those m . . . . f-f . . . . . g, n . . . . r-hating cops."

Q. Did you have any other conversation with him?

A. After I booked him I gave Mr. Johnson the right to use the station phone to make preparations to make bail or whatever he wanted, to get in touch with somebody.

Q. What did he say to you?

A. He said he didn't have to make a call, even the law and I couldn't book him.

Q. Even the law and you couldn't book him? Is that what he said?

A. Yes, sir.

Mr. McAuliffe: Your witness.

[Tr. 239] Cross-examination.

By Mr. Harrington:

Q. At the time Johnson said this to you you had booked him, hadn't you?

A. I was in the process of booking him, yes, sir, taking his information.

Q. Did you tell him you booked him?

A. Yes, sir, I arrested him on Route 1.

Q. When you had him there in custody did you tell him you booked him?

A. Yes, sir.

Q. Did you tell him what you booked him for?

A. Yes, sir.

Q. You told him you had booked him before you said anything about using the telephone, is that right?

A. I told him he had been under arrest for motor-vehicle violation. If he wanted to make a call he had a right to use the phone.

Q. And you told him you booked him?

A. Yes, sir.

Q. And you told him what you booked him for?

A. Yes, sir.

Q. And did you do that? Did you book him and tell him you had booked him before you told him about using a telephone?

[Tr. 240] A. I told him what he was arrested for on Route 1.

Q. But you didn't tell him he had been booked?

A. I booked him when we returned to the station, yes. I took all his information.

Q. The first thing you did, when you got the information, was book him?

A. Yes, sir.

Q. And then did you tell him you booked him?

A. Yes, sir.

Q. And then you told him what you booked him for?

A. Yes, sir.

Q. And then you told him he could use the telephone?

A. Yes, sir.

Q. And after, it's your testimony that after you had told Johnson you booked him he told you that you couldn't book him, is that your testimony?

A. That is what he said.

Q. But did you tell him again that you had booked him?

A. I put him in the cell.

Q. And how long did you keep him in the cell?

A. Till the following morning.

Q. And what was he booked for?

A. Operating to endanger. He was charged with operating to endanger.

[Tr. 241] Q. And he was kept in a cell over night?

A. Yes, sir.

Q. And what happened then?

A. He was taken to Wrentham District Court where he pleaded, guilty, and was fined thirty-five dollars.

Q. Had you ever seen him before?

A. No, sir.

Q. Or since?

A. I have seen pictures of him since. Till this morning I——

Q. You never actually saw him between that time in 1956 and now?

A. No, sir.

* * * * *

[Tr. 245] Police Stenographer George T. Indignaro.

Direct examination.

By Mr. McAuliffe:

* * * * *

A. There was a witness, named Mary Ann Taylor of 220 Newbury Street, Boston. She was asked by Lieutenant-Detective Donovan, to wit, the members on the platform, and she pointed to Ronald Johnson.

Q. Yes.

A. And she stated that it was about 9.00 o'clock.

Q. She made a statement, right?

A. Yes, she picked him out.

The Court: No. Now, listen to the question.

Q. She made a statement?

A. Yes, she made a statement.

Q. All right, you have answered. Did Lieutenant Donovan say anything to Johnson with reference to the statement she made?

A. Yes, sir.

Q. What did he say?

A. Lieutenant Donovan said to Mr. Johnson, "What do you want to say?"

Q. Did Johnson reply?

A. Mr. Johnson replied: "Are you sure it was me?" indicating the question to Miss Taylor.

Q. Now, did Lieutenant Donovan ask the defendant Johnson any other questions following any statement by someone who appeared before the line-up?

[Tr. 246] A. There was a question by Lieutenant-Detective Donovan to Mr. Johnson: "You heard what he said?" Reply by Mr. Johnson: "Yes."

Q. Anything else?

A. Question by Lieutenant-Detective Johnson to Mr. Johnson: "Do you have anything to say after having been picked out by a witness?" Answer by Mr. Johnson: "I would like to." And a question: "Well, you heard what this man said. He said he saw you on Newbury Street." Answer by Mr. Johnson: He is standing on 7, indicating the numbers on the wall in the line-up room. "Question: Is this the man you picked out?" And the answer was: "Yes, Yes. You are the seventh man, counting from the left." And that was to indicate the position that Johnson was in.

Q. No, no. That is what was said. Now I ask you to read this, sir, and ask you whether or not that refreshes your recollection as to——

The Court: What page is that?

The Witness: Page 19.

Q. Page 19, as to whether or not the defendant Johnson was asked any question, if he made any reply?

A. Yes, sir.

Q. All right. What was said and by whom and what [Tr. 247] reply, if any, did Johnson make?

A. Question by Lieutenant-Detective Donovan to the witness. Shall I give his name, the name of the witness?

Q. Yes.

A. John Megna, M-e-g-n-a. "What kind of car was it?" Answer by Mr. Megna:——

Q. No, please. I asked you whether or not Mr. Donovan asked Johnson any question as a result of what somebody said. Did he?

A. Yes.

Q. What question did Lieutenant Donovan ask?

A. "Mr. Johnson, you heard what this man said. What have you got to say about it?" Answer by Mr. Johnson: "I said it when I was down at Station 10. And another thing, if he was a long way from the car, how did he spot me?" "Question: Have you anything else to say?" "Answer: Not right now.

Mr. McAuliffe: You may inquire.

Cross-examination.

By Mr. Harrington:

Q. Were you on duty on the night of August 1, 1963?

A. Yes, sir.

Q. What time did your tour of duty begin?

A. I arrived at Station 16 about 10:30 in the evening of August 1.

[Tr. 248] Q. And that was a regular tour of duty?

A. No. This was a phone call to my home. It was not my regular tour of duty.

Q. You went to Station 16 first?

A. Yes, sir.

Q. Did you go to Station 10 at any time?

A. No, sir.

Q. And where is this line-up?

A. At police headquarters on Berkeley Street.

Q. How long were you at Station 16?

A. About two or three hours.

Q. You didn't see the defendant Johnson there?

A. No, sir.

Q. What time did you get to police headquarters?

A. About ten minutes of 1.00.

Q. That would be in the morning of August 2nd?

A. Yes, sir.

Q. And there came a time when you saw the defendant Johnson?

A. Yes, sir.

Q. And when did you first see the defendant Johnson?

A. About ten minutes of 3:00.

Q. And where was he?

A. In the line-up room at police headquarters.

Q. You hadn't seen him before that?

[Tr. 249] A. No, sir.

Q. And who was in charge of the line-up?

A. Lieutenant-Detective Donovon.

Q. And what other officers were there in the line-up room?

A. In the line-up room it was filled with officers, approximately forty-five to fifty officers.

Q. Was there a witness in the room at the time.

A. At the beginning of the line-up?

Q. That's right.

A. No.

Q. So, in the line-up room there was yourself, Johnson?

A. No, sir. There was nobody in the line-up room except the officers; and then the men come into the line-up room later.

Q. There were forty-five to fifty officers in the line-up room?

A. Seated in the line-up room.

Q. And then the men came in?

A. Yes, sir.

Q. And it was at this time you saw Johnson?

A. Yes, sir.

Q. And where were you with relation to the place where the men lined up?

A. I was seated about three or four feet from the [Tr. 250] platform at a desk.

Q. And where was Lieutenant Donovan?

A. He was seated to my right at the desk.

Q. Was there anyone else seated at the desk?

A. At that particular desk, no, sir.

Q. And on how many occasions did you see Johnson brought into the line-up room?

A. Twice.

Q. And the first time was approximately when?

A. About ten minutes of 3:00.

Q. And how long was Johnson in the line-up room?

A. For the whole period of the line up; or the first time?

Q. For the first time he was in?

A. About twenty minutes.

Q. And then he left?

A. Yes, sir.

Q. He was taken away by someone?

A. Yes, sir.

Q. And then he came back a second time?

A. Yes, sir.

Q. And how long after he had gone away from the line-up room did he come back to the line-up room?

A. About twenty minutes.

[Tr. 251] Q. And then how long was he in the line-up room?

A. About twenty-five more minutes.

Q. And Lieutenant Donovan was in charge the whole time?

A. Yes, sir.

Q. And have you given us everything that you heard Lieutenant Donovan say to Johnson?

A. Yes, sir.

Q. You have told us everything that you heard him say?

A. Yes, sir.

Q. And you were right by him the whole time?

A. Yes, sir.

Q. And have you given us everything that you heard Johnson say to Lieutenant Donovan?

A. Yes, sir.

Q. Did Johnson remain in the same place in the line-up each time that he was brought in?

A. No, sir.

The Court: May I interrupt here a moment? Mr. Witness, just to be sure that I understand your testimony and to be sure that you understand counsel. Have you gone over that transcript that you had to pick out every time Lieutenant Donovan spoke and every time that Johnson spoke?

The Witness: Well, I could answer it this way——

[Tr. 252] The Court: No, no. Have you done that?

The Witness: I didn't have a chance to go over the whole testimony. I did look at it.

The Court: You want your answer to be understood in the light of the fact that you haven't examined that in detail?

The Witness: Not in detail.

Mr. McAuliffe: May I offer the witness so he can refresh himself thoroughly?

The Court: He has already used it to refresh his recollection.

Mr. McAuliffe: And if Your Honor please, if I recall, Your Honor, I asked the witness—and I state this for the record, not that I don't want to make this available, but simply—I asked him that every question Lieutenant Donovan asked of Johnson and whether or not Johnson made a reply. And the record will show that many people were asked questions that he hasn't testified; but I confined it to Lieutenant Donovan asking Johnson and Johnson replying.

The Court: Let the witness have an examination of the record he himself then made, so long as he answered in that method. I am just affording him an opportunity to be sure of his answers. That is all.

[Tr. 253] Q. I would like you to examine this, sir, and tell us, after you have examined it, if you have given to us all of the statements you heard Lieutenant Donovan make to Johnson, either by way of question or statement, any address that Lieutenant Donovan addressed to Johnson.

A. Yes.

Q. Have you examined it?

A. Yes.

Q. And you have given us in your previous testimony all of the statements or questions, all forms of address of Lieutenant Donovan to Johnson?

A. Yes, sir.

Mr. McAuliffe: At the line-up.

Q. At the line-up, which is what I am referring to, at both line-ups?

A. Yes, sir.

Q. Now, did you hear any other officer speak to Johnson while he was in the line-up?

A. Not that I recall.

Q. And you were how far from Johnson?

A. About three to five feet.

Q. And that is both, at both line-ups?

A. Yes, sir.

Q. And your testimony is that you did not hear any other

[Tr. 254] officer address Johnson during the period of those line-ups?

A. Yes, sir.

Q. And have you told us everything that you heard Johnson say during the period of those two line-ups?

A. Yes, sir.

The Court: And you say that after examining that transcript?

The Witness: Yes, sir.

The Court: All right.

Q. Did you see the defendant Johnson?

A. Yes, sir.

Q. Were the lights bright in the line-up?

A. Yes, sir.

Q. In fact, they are very bright, are they not?

A. They are very bright, sir.

Q. Did you see any blood on his face?

A. No, sir.

Q. At any time?

A. No, sir.

Q. Did you see any blood on his neck or chest?

A. No, sir.

Q. Did you see any blood on the back of his head?

A. No, sir.

[Tr. 255] Q. Did he at any time in the line-up turn around?

A. No, sir.

Q. In other words, he stood in the line-up, faced to the audience?

A. He faced me at all times, yes, sir.

Q. Was he ever turned so that his profile was visible?

A. No, sir.

Q. Now, after you had seen Johnson in the line-up you saw Johnson again that evening, did you not?

A. Yes, sir.

Q. On how many occasions?

A. On one other occasion.

Q. And when was that?

A. About 5:30 in the morning, on the second floor, the homicide unit at police headquarters, in an office. He was seated at a desk.

Q. And who else was present?

A. Lieutenant-Detective Donovan, Sergeant Cunningham, Sergeant Leo Gannon and myself.

Q. And who asked you to go to that room?

A. Lieutenant-Detective Donovan.

Q. And how much of an interval was there between the time you went to that room and the last time you saw Johnson in the line-up?

[Tr. 256] A. Approximately an hour, an hour and a half.

Q. And had you seen Johnson at any time in the interval?

A. No, sir.

Q. And you went to that room at Lieutenant Donovan's request?

A. Yes, sir.

Q. Did you take down and transcribe everything that was said in that room while you were there?

A. Yes, sir.

Q. And you testified in the trial of the case of Commonwealth v. Johnson as to what was said in that room?

A. Yes, sir.

Q. And you testified from your notes?

A. Yes, sir.

Q. And your notes contained everything that was said in that room?

A. Yes, sir.

Q. Now, in that room you had a stenotype machine?

A. No, sir. I write shorthand with a pencil and notebook.

Q. Did you have a pencil and notebook at the line-up?

A. Yes, sir.

Q. Did you identify yourself to Johnson as a police stenographer?

A. No, sir. Lieutenant Donovan introduced me to Mr. [Tr. 257] Johnson.

Q. What did he say?

A. He said, "This is our police stenographer, George Indignaro.

Q. And when did he say that?

A. Who?

Q. Lieutenant Donovan.

A. In brief, he asked him: "Are you willing to answer my questions?" But I wouldn't know every word for word what he said, but I do recall him asking that.

Q. And what did Johnson say?

A. He said, "Yes." And then the questioning began.
Q. This was in the room on the second floor?
A. On the second floor at police headquarters.
Q. And that is when you were introduced?
A. Yes, sir.
Q. But you hadn't been introduced in the line-up, is that correct?
A. No, sir.
Q. And Lieutenant Donovan hadn't said, at the time of the line-up, "This is the police stenographer George Indignaro?
A. If he did I'd forget now.
Q. Well, you have testified that the first time you were [Tr. 258] introduced was in the second floor, in the Homicide room?
A. I do recall that.
Q. And that was approximately?
A. Around 5:00.
Q. An hour and a half after the line-up ceased, is that correct?
A. Yes, sir.
Q. But you did take notes during the line-up?
A. Yes, sir.

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[Tr. 262] LIEUTENANT JOHN J. DONOVAN.

Direct examination.

By Mr. McAuliffe:

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Q. Later on, sir, on August 2nd, the following morning, did you conduct a line-up at the Boston Police Headquarters?
A. Yes, sir.
Q. And who was the stenographer, if there was one present there?
[Tr. 263] A. Mr. George Indignaro.
Q. And Mr. Johnson was brought into the line-up, was he?

A. Yes, sir.
Q. How many times was he brought into the line-up?
A. Twice, sir.

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[Tr. 273] LIEUTENANT JOHN J. DONOVAN.

Cross-examination.

By Mr. Harrington:

* * * * *

Q. Now, how long was the first time that Johnson appeared in the line-up?
A. I'd say, twenty minutes to a half an hour.
Q. And how long was the second time?
A. Probably a little less, maybe fifteen or twenty minutes.
Q. Now, on either of those occasions did you observe any blood on his face?
A. No, sir.
Q. Or on his chest or neck?
A. No, sir.
Q. Or on the back of his head?
A. No, sir.

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[Tr. 296] CAPTAIN LEO P. TRAMBUKIS

Direct examination.

By Mr. McAuliffe:

* * * * *

Q. Directing your attention, specifically, to August 15, 1959, did you have occasion to see this defendant Johnson somewhere?
A. I did, sir.
Q. Where?
A. In front of the Celebrity Club, a night club, at 56 Randall Street in Providence.

Q. Did you have any conversation with him?

A. I did.

Q. Did anyone have conversation with him in your presence?

[Tr. 297] A. Yes. The arresting officers did.

Q. Who are they?

A. Patrolman Gihlin and Patrolman Cardullo.

Q. And what was said by Johnson and what was said by these two Patrolmen?

A. The officers were attempting to get an identification on the prisoner and the defendant Johnson refused to answer them, cursing them.

Q. What did he say?

A. He said, "I don't have to tell you f-----g cops anything and I don't have to go anywhere with you f-----g cops."

Q. And what later took place after this that you saw?

A. This all took place in the street in front of the club; and upon my arrival at the scene I directed that he be put into a patrol wagon and taken to the station.

Q. And he left?

A. Yes, sir.

Q. And with these officers?

A. They accompanied him.

Q. You didn't accompany them?

A. No, sir.

Q. But I do understand this conversation you testified to took place in your presence before he left?

[Tr. 298] A. Out in the street in front of the club.

Mr. McAuliffe: Your witness.

Cross-examination.

By Mr. Harrington:

Q. Captain, did you know the name of the defendant at at time?

A. I did not, no, sir.

Q. And you subsequently learned it?

A. At the station, yes, sir.

Q. And was the defendant—how long was the defendant at the station?

A. He was charged with disorderly conduct, held overnight and appeared in Court the next morning.

Q. Then what happened?

A. He pleaded guilty to a disorderly conduct charge and was fined.

Q. How much?

A. Ten dollars, of course.

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[Tr. 299] DETECTIVE WILLIAM B. GIBLIN.

Direct examination.

By Mr. McAuliffe:

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Q. I direct your attention, sir, to August 15, 1959, and ask you whether or not you saw this defendant Johnson on that date?

A. Yes, sir, I did.

Q. And where was it that you saw him?

A. Inside the Celebrity Club located at 56 Randall Street in the City of Providence.

Q. And what was he doing?

A. Upon my arrival he was running from the front of the club towards the rear of the club.

Q. Did you have any talk with him or did anyone with you have any talk with him?

A. Myself and Patrolman Cardullo at that time.

Q. What was the conversation you had with him, what you said or Cardullo said?

A. Either I asked him to identify himself. He said, "I don't have to tell you f..... g cops anything. I know my rights. I don't have to answer a f..... g question."

Q. And what took place in addition to that?

[Tr. 300] A. Well, we took him from the club outside to the street and all the way out he was cursing us, calling f..... g that f'ing that; and "I don't have to go down to the station with you f'ing cops. I don't have to answer any f..... g questions." Upon arrival in the street we were met by the sergeant and he questioned him. He didn't answer a question.

Q. He was taken to the station house?
A. Yes, he was.

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[Tr. 301] DETECTIVE-SERGEANT HORACE H. CRAIG.

Direct examination.

By Mr. McAuliffe:

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Q. Now I direct your attention, sir, to June 1958, did [Tr. 302] you have occasion to see this defendant Johnson in that month?
A. Yes, I did.
Q. What were the circumstances?
A. I arrested him for assault with a dangerous weapon.
Q. On who?
A. On a patrolman Edward Richman.
Q. And was he later brought to court?
A. Yes.
Q. And go to trial?
A. Yes.
Q. How long did the trial last?
A. Three to four days, I believe.
Q. Represented by a lawyer, was he?
A. Yes, he was.
Q. Now, was there some other occasion when you saw this defendant Johnson officially?
A. Yes.
Q. When was thta?
A. June 5, 1963.
Q. And did you have some talk with him as to what you wanted to talk to him about?
A. Yes, I did.
Q. What did you tell him?
[Tr. 303] A. I told him that I was bringing him in for investigation, after he was stopped by a patrolman.
Q. And what did he say when you told him you were bringing him in?
A. He wanted to know, what for. And then he asked,

was it for the same reason he was questioned in Boston for. I said, "Yes." And he said, "Well, they'll have to prove it."

Mr. McAuliffe: Your witness.

Cross-examination.

By Mr. Harrington:

Q. Sergeant, what was the result of that trial in June of 1958, on the charge of assault with a dangerous weapon?
A. He was acquitted.

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[Tr. 305] CAPTAIN JOHN L. EDDY.

Direct examination.

By Mr. McAuliffe:

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Q. I direct your attention, sir, to June 5 of this year, did you see the defendant Johnson on that occasion?
A. Yes, sir. He was brought into my office.
Q. And is that in Providence Police Department?

The Court: Of what year?
Mr. McAuliffe: Excuse me. 1963. I'm sorry, Your Honor. My mistake.

Q. June 5, 1963?
A. Yes, sir.
Q. Did you have some talk with him?
A. I did.
Q. And concerning what?
A. A crime that we were investigating in Providence.
Q. And what type of crime?
A. It was a hold-up of a liquor store where a woman [Tr. 306] employee dropped dead of a heart attack during the hold-up.
Q. You questioned him concerning that?
A. Yes, sir, I did.

Q. And did he have some paper on him that you talked to him about or some card?

A. He had a lawyer's card with the name of a lawyer in Providence, Rhode Island.

Q. What, if anything, did you say to him with reference to that card?

A. I later told him that I was going to turn him over to the State Police, did he want to call his lawyer?"

Q. And who was the lawyer?

A. Portnoy.

Q. And that was the card that you found on his person?

A. Yes, sir.

Q. I show you this, sir, and ask you if that is the card?

A. Yes, sir, that is the card.

Q. Would you read it, please, into the record?

A. It says, "Residence—would be the telephone—"Cherry 5-8662." The name is "Jacob D. Portnoy, Counselor at law." He has an address of "Pulner and Portnoy, 62162 Industrial Bank Building, Providence, Rhode Island," with a telephone number, "Dexter 1-6266." That building is located at "11 West Minister Street," in Providence.

[Tr. 307] Q. Now, I understand you to say you asked him if he wanted to call this lawyer?

A. I did.

Q. What did he say?

A. He said right out, "F . . . the lawyer."

Mr. McAuliffe. Your witness.

Cross-examination.

By Mr. Harrington:

Q. Captain, did you charge the defendant Johnson with anything on June 5, 1963?

A. No, sir. I turned him over to the Rhode Island State Police.

Q. You didn't charge him with anything?

A. No, sir.

Q. And you don't know whether or not they charged him with anything?

A. No, sir, I don't.

Q. Had you arrested him?
A. Sir?
Q. Had you arrested him?
A. Yes, sir, he was under our custody.
Q. No charges were pressed against him?
A. No, sir.
Q. Did he sign a release?
A. You don't have to sign no release in Rhode Island.

[Tr. 312] JAMES DANIEL GLYNN.

Direct examination.

By Mr. McAuliffe:

Q. Did you remain there with him for some time?
A. Yes, sir.
Q. And did you provide him with something while he was there?
A. Yes, sir.
[Tr. 313] Q. What?
A. Sandwich, cup of coffee.

Mr. McAuliffe: Your witness. Excuse me, just one question.
Mr. Harrington: Go right ahead.

Q. Was Officer Daley there, too, at homicide?
A. Yes sir.

Cross-examination.

By Mr. Harrington:

Q. Mr. Glynn, did you stay in the line-up room while Johnson was in the line-up?
A. Yes sir.
Q. And on how many occasions? On one or two occasions?
A. Well, I don't recall how many occasions, but I was there when the witnesses come in and picked him out at the line-up.

Q. How long were you there?

A. Well, it was rather a lengthy line-up. I don't know the time exactly how long I was in the line-up.

Q. And where were you with relation to Johnson, in terms of distance?

A. In the line-up room?

Q. Yes.

A. I was sitting in the seats, probably in the middle of the room.

[Tr. 314] Q. And how many police officers were in the room?

A. I'd say the best part of probably fifty to a hundred. There were quite a few there.

Q. Did you say anything to Johnson?

A. No, sir.

Q. Did Johnson say anything to you?

A. No, sir.

Q. This is in the line-up room?

A. No, sir.

Q. Did you hear anything that was said to Johnson?

A. Well, the usual procedure at the line-up, to the witness there. There were some men in this line-up. "Have you seen anybody before?" Things of that nature.

Q. That is all you heard? That wasn't addressed to Johnson, was it?

A. No, to the witnesses.

Q. Did you hear anything that was said to Johnson?

A. I don't recall specifically.

Q. Did you hear Johnson say anything?

A. I know a couple of times he answered the witnesses in some fashion.

Q. Could you hear what he said?

A. Not particularly.

[Tr. 315] Q. And you couldn't hear anything that was said to Johnson?

A. Once the witness picks them out then they step up closer and there is a conversation and the stenographer takes it down in shorthand; and you don't get that.

[Tr. 339] SERGEANT CHARLES E. HALL, JR.

Cross-examination.

By Mr. Harrington:

* * * * *

Q. Did you observe any blood on his face?
A. Not at that time, sir.
Q. And by that time, you mean, when?
A. The second floor in headquarters.
Q. Had you seen any blood on his face at the previous time?
A. A trace of blood on the side of his face at the line-up.

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[Tr. 362] DETECTIVE FRANCIS J. MURPHY.

Cross-examination.

By Mr. Harrington:

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Q. Did you see any blood on his face?
A. Yes, sir.
Q. And where on his face was it?
A. If I remember there was a little blood on this side of his head.
Q. And you are pointing to the right side?
A. Yes, sir.
Q. On the temple above and to the front of the ear?
A. I think so, yes.
[Tr. 363] Q. And was the blood—was there continuing to be more blood? I mean, was it running down his face?
A. No, it was dried blood.
Q. Was there any blood on his, the back of his head?
A. I didn't notice any.
Q. How about on his neck and chest?
A. I didn't see any.

Q. How about under his chin?
A. No, I didn't see any.

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[Tr. 364] DEPUTY JOHN T. HOWLAND.

Direct examination.

By Mr. McAuliffe:

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Q. Now, Deputy, on the morning of August 2, 1963, did you see this defendant at police headquarters?
A. I did.
Q. And where was he, sir, when you saw him first?
A. I saw him at the robbery squad's room.
Q. I see. And other officers were there, were they?
A. Yes, there were three or four officers in the room.
Q. And whether or not they spoke to you?
A. They did. They all spoke.
Q. And they addressed you as what?
A. Deputy.
Q. At any time, sir, did this defendant ask you for a lawyer?
A. No. He didn't speak to me at all.
Q. Did he make any mention to you or anyone with reference to a lawyer?
A. No. I didn't hear him ask anyone at all.
Q. Now, Deputy, did you see him some place else?
A. Yes. I saw him in the line-up room across the hallway.
Q. And who was conducting the line-up?
A. It was Deputy Slattery and John Donovan.
Q. John Donovan was conducting it? Lieutenant Donovan?
A. Yes.
Q. Did you observe whether or not the defendant asked [Tr. 365] questions of any witnesses that were brought before the line-up, sir?
A. Yes, he did.
Q. Tell us just how he did it?
A. I forget the exact words, but I know he stepped up

to the front of the stage and, challenging men, he spoke, asked them something like, "How could you see me?"

Q. I see. And where were you in this line-up room, sir, when you observed this?

A. I was in about the fourth row. I sat on the end seat in about the fourth row; and I got up and walked up to the side of the platform they use there.

Q. What did you notice about his appearance other than what you have told His Honor?

A. Well, he had a tear in one of his pant legs. I forget which leg. And he had a torn shirt. There was stains on his shirt that looked, that might have been dried blood.

Mr. McAuliffe: Your witness.

Cross-examination.

By Mr. Harrington:

Q. Deputy, how long did you observe Johnson in the room of the robbery squad at headquarters on the night of August 2nd?

A. I went into the room either two or three times while [Tr. 366] I was there. The total time I observed him probably wouldn't have been a hour altogether; but it was perhaps for ten or fifteen minutes at a time.

Q. And how—can you give us the time separation or the time interval between the first, the second and the third observations of Johnson in the room of the robbery squad?

A. Well, as soon as I heard that he was coming into the building I went down. My assignment doesn't take me in to inject myself into investigations of this nature, but just to see that they are conducted properly and that no violations of anyone's rights are made or anything. That is my job as Chief of the Bureau of Special Services. As soon as I heard he was coming I was there; I saw him at that time. And several of the men spoke to me. I spoke to different ones and they addressed me as, Deputy, and I went out.

I stood out in the corridor for a while and asked Lieutenant Donovan, when I saw him, what time the line-up was going to be; and he told me, very shortly. So I went back into the robbery room again and just generally walked around the area and observed the line-up room to make

sure that in my judgment everything was in order and there'd be no problems.

[Tr. 367] So, I would say, perhaps ten minutes between the occasions that I did see Mr. Johnson.

Q. Did you see Johnson in the robbery room after his appearance, after either of his appearances in the line-up?

A. I did.

Q. Was it after the first or second appearance?

A. Between the two appearances, I'd say.

Q. Now, at any time did you address any words to Johnson?

A. No, I didn't speak to him. I did go over and look at him, though.

Q. And did he address any words to you?

A. No, no, he didn't speak.

Q. Now, when you say you observed him, did you observe any blood on his face?

A. There wasn't any blood there, but there was a scratch, a scratch which went up into the hairline.

Q. Was that in front or behind his ear?

A. My recollection was it was in front of the ear, right up into the hairline here.

Q. And that was on the right side of the head?

A. Right side, yes.

Q. Was there any blood on the back of his head?

A. No, no.

• • • • •

[Tr. 409] Mr. McAuliffe: The Commonwealth wishes to stipulate that on the 23rd day of August, 1954, the defendant Ronald L. Johnson was court-martialed subject to the following charges:——

The Court: This all shows by the record?

Mr. McAuliffe: As it shows by the record. Charge 1: That [Tr. 410] he was absent without proper authority from his organization; Charge 2: Charged with failing to obey a lawful order or regulation by transporting aboard the base one bottle of blackberry brandy. He was adjudged guilty: sentenced to be confined at hard labor for a period of three months, and to forfeit forty dollars, per month, for a period of three months, and be reduced to the grade of private. On August 25, 1955, his sentence was modified in that the

confinement at hard labor—strike that—a portion of the sentence adjudging confinement at hard labor in excess of two months and of forty dollars, per month, in excess of two months, be suspended for a period of six months, at which time, unless the suspension be sooner vacated, the suspended portion of the sentence will be remitted without further action. And that the base brig of the Marine Corps, Marine Camp Base, Camp Pendleton, California, is designated as the place of confinement.

And the Commonwealth further stipulates that, according to the record, the defendant Ronald L. Johnson, during his term of service in the Marine Corps, served as a brig guard during the period from February 1, 1954, to February 25, 1955.

[Tr. 411] The Commonwealth further stipulates that, according to this same record, Exhibits 6 and 7, that the defendant Ronald L. Johnson failed to comply with his basic orders on March 29, 1954, and on October 28, 1954, he was in violation of Article 91 of the Marine Corps, to wit: using disrespectful language towards his superior noncommissioned officer and was given two weeks extra duty.

The Commonwealth further stipulates that the signature of Ronald J. Johnson appears in several places in this same record, namely, Exhibits 6 and 7.

Mr. Harrington: I believe it's stipulated, or the Commonwealth will stipulate that the following interpretations of the Exhibit 6 are correct: That on the first page of the service record book, which is Exhibit 6, on the form, which is marked in the lower lefthand corner, "DD-214, in the box on the form, which is numbered 8 and described as: "Reason and authority for separation," that the letters "CofG," signify, "Convenience of the Government." And in the same legend the letters, "MCM," stand for "Marine Corps Manual;" and the letters, "MCGO," stand for "Marine Corps General Order." And the applicable paragraph of the Marine Corps Manual 1949, to which reference is made in that box, which is Box 8 of page 1, is contained in Exhibit 7. And [Tr. 412]the Marine Corps General Order 157, which is referred to in that same Box #8, is also contained in Exhibit 7.

The defendant Johnson also wishes to interpret, with the agreement of the Commonwealth, that on the page of the service record, which is entitled on the top, "Promotions and Reductions," the typewritten words, "Not recommended

for testing, 55-1," signify that in the first testing period of the year 1955 Johnson was not recommended to take the examination for promotion to non-commissioned officer; and further, that on the page of the service record, which is entitled at the top, "Military and Civilian Occupational Specialties and Education," in the box at the lower right-hand portion of that page so entitled, in which box is entitled, "Classification Aptitude and Trade Tests," that in the column marked, "Title," the following sets of letters signify the following words: "GCT" signifies, "General Classification;" "RV" signifies, "Reading Vocabulary;" the letters, "AC," signify, "Arithmetical Computation;" the letters, "AR," signify, "Arithmetic Reasoning;" the letters, "PA," signify, "Patterned Analysis."

And further, with respect to the test scores, with refer- [Tr. 413] ence to those tests which on this record appear in the category, "IV," ranging between 60 and 74, that there were at the time covered by this record five categories: Category I comprehended scores from 163 to 130; Category II included scores from 129 to 110; Category III included scores from 109 to 90; Category IV included scores from 89 to 60; and Category V included scores 59 to 42.

Mr. McAuliffe: Do you want to stipulate his separation from the services?

Mr. Harrington: We will stipulate that it appears that the reason for separation, or the authority for separation, under Marine Corps General Order #157, was the separation of Marines with General Classification Test Scores of less than 90.

Mr. McAuliffe: And that when he was separated from the service he still remained a member of the Marine Reserve Corps, subject to call?

Mr. Harrington: Correct. It was a release from active duty to the Marine Corps Reserve, pursuant to the authority contained in the documents which are comprised in Exhibit 7; and that in due course he was released from his service obligation as an enlisted Marine.

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Paper No. 40

Nos. 8478, 8479, 8480, 8482, 8483

FINDINGS, RULINGS AND ORDER

In his brief in support of his motion for new trial the defendant states that his motion "is based on the admission into evidence of the defendant's statement to Lieutenant John J. Donovan."

At the trial, objection was made to the admission of the statement on the ground that it "was involuntarily given because of physical force applied to the defendant by the police so that the statement was coerced from him." (Transcript, 986, 1002, 1003) After hearing evidence in the absence of the jury on that issue, I found that the statement was voluntarily given and ruled it admissible.

The contention now made by the defendant that the statement is inadmissible rests upon grounds not stated at the trial. In his brief and in the oral argument, the defendant explains that his "motion for new trial relies on the principle which is set forth in the case of *Escobedo* v. *Illinois*, 378 U. S. 478." That case was decided subsequent to the trial of the defendant. At the hearing of the motion for new trial, there was a conflict of testimony on several points of importance, and I, therefore, have deemed it appropriate to report the facts found after resolution of the conflict. See *Townsend* v. *Sain*, 372 U.S. 293.

1. On August 1, 1963, about 9.00 P.M., Officer James B. O'Leary of the Boston Police was shot while attempting to effect the arrest of a person on Commonwealth Avenue near the junction of Exeter Street. He died from the gunshot wounds shortly before 3.00 A.M. the following morning.

2. About 9.30 P.M., August 1, defendant Johnson was taken into custody at the rear of 20 Fenwood Road, Roxbury, by two police officers after a brief "wrestle". He was handcuffed shortly afterwards and the officers walked him along Fenwood Road to the corner of Huntington Avenue where they stopped at a police box. Before reaching the box other police officers joined the trio and all waited at the police box for a police car. When the car arrived, defendant was placed in it and, with several officers, proceeded to Division 10 where, starting at 9.35 P.M., he

was booked and then placed in a cell. Sometime after 10.15 P.M. he was taken to police headquarters.

3. Between midnight and 12.30 A.M., August 2, defendant was in a police lineup at headquarters. He was again in a lineup about 2.00 A.M.; again around 3.00 A.M.; again shortly before 4.00 A.M. At about 5:50 A.M., defendant was interrogated by Lt. Donovan in the presence of Sergeants Cunningham and Gannon. Police stenographer George Indingaro recorded the interrogation which lasted approximately forty minutes. This was the "statement" admitted in evidence at the trial over the objections of the defendant, and which now, because of its admission, is urged as the basis for a new trial.

4. At the time of his arrest, the defendant was suffering from an injury to his person. When he was booked he was bleeding from a cut about an inch or inch and a half long on the right side of his head. When the defendant was in the several lineups on the morning of August 2, he had blood on his face or head. Later in the morning of August 2 at Charles Street Jail it was found that there was an ecchymotic area below the left eye, abrasion of the right thigh, and a laceration on top of the scalp. On August 16 it was found that he had a "subdural hematoma, a collection of blood between the dura and the brain itself." In the opinion of the surgeon who operated on the defendant for the condition, the subdural hematoma "could have been there anywhere from one to two weeks."

5. Prior to his arrest, the defendant was the driver and sole occupant of a Buick car which was closely pursued by the police through Louis Prang Street, Palace Road, Longwood Avenue, and Huntington Avenue. Five shots were fired at the Buick from the police revolver in the hands of Officer Santino in the pursuing police car on Huntington Avenue, 15 or 20 feet to the rear of the Buick. On Sunset Street the Buick went over the sidewalk, struck a masonry wall and careened off it, and went down Sunset Street "banging up" against 4 or 5 cars. Officer Chalpin fired two shots at the rear of the Buick as it went down Sunset Street. The Buick turned right into Hillside Street and then into Frawley Street. At the corner of Frawley Street and Huntington Avenue, the Buick violently collided with an M.T.A. bus. Defendant left the Buick at that point,

ran limping around the rear of the bus into Kempton Street, into an alley off Kempton Street, and over a barbed wire fenc to the raer of 20 Fenwood Road where he was taken into custody.

6. At the trial, the defendant testified at the *voir dire* that he was not injured before he left the Buick and after it collided with the bus, and denied that he was limping when he ran away from the Buick. He further testified that the injuries to his body which were noticeable during the time he was in the custody of the police were inflicted by the police. He also testified that he was caused to make the statement to the police "when they grabbed (him) by the testicles." At the hearing of the motion for new trial, he testified that he was struck by a policeman at headquarters. He further testified at the hearing on the motion that he several times "asked for counsel, asked for a lawyer" of various police officers who had him in their custody—at the time he was placed in the police car, at the booking desk, while he was in the cell at Division 10, and while he was at headquarters.

7. In certain important matters the testimony given by defendant at the trial and at the hearing of the motion was contradictory and uncertain. His testimony was contradicted in many respects by police officers called to testify both at the trial and at the hearing of the motion. I found unbelievable the testimony given by him at the trial to the effect that he was not injured before he left the Buick car. I found he was injured at that time. I also found the testimony given by him at the trial to the effect that he was beaten by police officers and that he gave the statement to Lieutenant Donovan unwillingly and only because he was beaten by the police, or threatened with physical harm, or because the police grabbed or squeezed his testicles, as unreliable and not believable. I was satisfied by the fair weight of the evidence presented on the issue of the alleged involuntary character of th "statement" that defendant gave it voluntarily. I found the testimony of the defendant given at the hearing on the motion for new trial, to wit, that he "asked for counsel, asked for a lawyer," not true. I find he made no request of the police at any time before he gave the statement to Lieutenant Donovan for opportunity to consult with counsel, and I am satisfied of that

fact by the fair weight of the evidence offered on that issue. I also find that the police did not refuse the defendant opportunity to consult with counsel.

8. I find that at the booking desk at Division 10 there were marks of injury on defendant's head and that he was bleeding. He was being held by one or more police officers while he was standing at the desk. He was struggling with them and cursing at them. Several officers spoke with him seeking to quiet him down. He continued non-cooperative, excited, and agitated throughout most of the booking process. The room was noisy. There were several other police officers and newspaper reporters in the room at the time. Photographs of the defendant and officers who had him in custody were taken, with flashbulbs going off in the process. During the booking, Lieutenant Richardson exhibited to the defendant the printed form entitled, "Prisoner's Right to Use Telephone," which was introduced in evidence at the hearing on the motion and marked Exhibit #2, and is incorporated herein by reference and made a part hereof. The defendant refused to sign it.

9. I am satisfied by the fair weight of the evidence, that an opportunity was given defendant by Lieutenant Richardson to read and to sign Exhibit #2. I am not satisfied that in the circumstances of turmoil, confusion, and noise attending the booking process at Division 10 that there was communicated to defendant the information referred to in General Laws (Ter. Ed.) Chapter 276, s. 33A. This was due almost entirely to the defendant's belligerent attitude toward Lieutenant Richardson and other police officers and his refusal to cooperate with the lieutenant during the booking process. The noise and distractions made by the newspaper photographers and reporters contributed to some extent but not importantly. I am satisfied that Lieutenant Richardson believed he had performed the duty imposed upon him under the statute when he presented Exhibit #2 to defendant to read and requested his signature. I am also satisfied that he fully appreciated the difficulty of communicating information to defendant in that manner when defendant in a belligerent mood refused to cooperate. Unless defendant's refusal to cooperate or to comply with the request to read the paper and to sign the same should be deemed equivalent to a waiver of any rights

he had to be informed of the matters referred to in General Laws (Ter. Ed.) Chapter 276, s. 33A, I find that otherwise there was no waiver by defendant of such rights.

10. When defendant refused the request to sign Exhibit #2 at the booking desk, he declared that he knew his rights. In Providence, Rhode Island, on other occasions, he refused to identify himself to the police prior to his arrest, declaring he was not required to do so. On all occasions he has expressed his belligerence and non-cooperation in habitually foul and offensive language toward the police officers involved. No police officer told the defendant at any time, from the time he was taken into custody at the rear of 20 Fenwood Road until he completed his statement to Lieutenant Donovan, that he had "the right" to remain silent, or "the right" to refuse to answer any questions put to him by the police, or that anything he said to the police might or could be "used against him". During the lineup, the defendant heard several persons identify him as the man involved in the shooting on Commonwealth Avenue. He asked certain questions challenging the accuracy or credibility of the identification by some, without effecting any change by the identifying witnesses. After the last of the four lineups, he said to Lieutenant Donovan, in response to the latter's inquiry, that he would talk to him. At that time the defendant had become, together with Herbert Graves, the prime suspect in the felonious homicide of Officer James B. O'Leary. I find that his willingness to talk to Lieutenant Donovan at this time was not a waiver of any "right" he had to remain silent and to refuse to talk to the police at that time or to be cautioned by the police at that time of such "rights", if it should be determined that in the circumstances he had any one or all of such "rights". Whatever his declarations were at other times concerning his rights *vis a vis* the police, I am not satisfied that he knew what his rights were at the time of the interrogation.

11. The questions of law raised by the defendant revolve around the "principle" set forth, as he views it, in *Escobedo*. The instant case is distinguishable upon the facts from *Escobedo* and *Commonwealth* v. *Guerro*, Advance Sheets (1965) 869, for the defendant had not requested and had not been denied opportunity to consult counsel. It is clearly distinguishable from *Massiah* v. *United States*, 377

U. S. 201, and *Commonwealth* v. *McCarthy*, Advance Sheets (1964) 1133. There are divergent views as to the applicability of *Escobedo* and whether the "principle" should be extended. There is a question also whether it should be retrospective. Under General Laws (Ter. Ed.) Chapter 278, s. 33A-33G, in this case will be reviewed by the Supreme Judicial Court. Such undecided views of *Escobedo* should more appropriately be resolved and be declared by that Court. I, therefore, deny the motion for new trial.

/s/ Frank J. Murray, Justice of the Superior Court.

July 2, 1965—Filed.

Paper No. 47

Nos. 8478, 8479, 8480, 8482, 8483

ASSIGNMENT OF ERRORS OF DEFENDANT RONALD L. JOHNSON

Now comes the defendant Ronald L. Johnson and under the provisions of G. L. c. 278 § 33D makes the following assignment of errors in each of the above captioned cases:

Assignment No. 1. The Trial Court erred by its denial of defendant Johnson's motion for Bill of Particulars (Exception No. 4, Transcript of Hearing on Defendants' Motions, p. 21).

The defendant was entitled to the Bill of Particulars to enable him to prepare his defense.

Assignment No. 2. The Trial Court erred by its denial of defendant Johnson's motion for inspection of Grand Jury minutes (Exception No. 5, Transcript of Hearing on Defendants' Motions, p. 21).

The defendant was in the circumstances entitled to inspect said minutes to enable him to prepare his defense.

Assignment No. 3. The Trial Court erred in allowing over objection the question: "Mr. Gannon, was the man that you saw outside the store or on the sidewalk a few doors from the liquor store, to the best of your knowledge, belief and recollection, the man that you saw rush by you in the store and approach Mr. Berman and do what you described?" (Exception No. 27, Tr. 262-263).

The question was leading and a catchall and should not have been allowed in view of the answer prior thereto at Tr. 251: "I cannot say it was the same man."

Assignment No. 4. The Trial Court erred in allowing over objection the question: "Well, do you recognize their build?" (Exception No. 31, Tr. 337-338).

This question was leading and there was no foundation, the previous question and answer being: "Can you identify either one of these men? A. Not by their face. I really didn't—we were terribly busy at the time."

Assignment No. 5. The Trial Court erred in admitting over objection cumulative and repetitive testimony as to

the position on the ground of Officer O'Leary and testimony as to his trip to the hospital and medical procedures there employed (Exceptions No. 44, Tr. 645-646; No. 46, Tr. 647-648; and No. 49, Tr. 653).

The testimony as to Officer O'Leary's position on the ground was cumulative and prejudicial and the testimony with respect to the hospital trip and medical procedures was irrelevant to any issue in the case and was inflammatory and prejudicial.

Assignment No. 6. The Trial Court erred in excluding the question on voir dire to Dr. Robinson: "Doctor, do you have an opinion as to the cause of this subdural hematoma?" (Exception No. 63, Tr. 953).

The testimony called for was competent and material.

Assignment No. 7. The Trial Court erred in admitting over objection the statement of defendant Johnson to Detective Lt. Donovan (Exceptions No. 64, Tr. 986, and No. 65, Tr. 1002-1003).

The statement was inadmissible because defendant Johnson, then in custody and upon whom prosecution had focused, had not been advised of his right to remain silent, had not been advised of his right to counsel, had not waived such rights, and the circumstances under which the statement was taken included Johnson's having been physically injured, having been recently the subject of pursuit, being of limited education and mentality, and having been in custody for approximately eight and one-half hours before his statement was taken.

Assignment No. 8. The Trial Court erred in admitting into evidence over objection the testimony of Stoller as to conversation with Johnson with respect to Johnson's expectation of acquiring money to purchase an automobile (Exceptions No. 66, Tr. 1027; No. 67, Tr. 1041-1042; No. 68, Tr. 1042-1043; No. 69, Tr. 1046; No. 70, Tr. 1048; and No. 71, Tr. 1050).

The testimony was immaterial, irrelevant, incompetent and prejudicial inasmuch as any connection between Johnson's expressing expectation of acquiring money and robbing was on this testimony purely speculative.

Assignment No. 9. The Trial Court erred in denying the defendant Johnson's motion to strike the testimony of

Stoller as to the said conversations with Johnson (Exception No. 72, Tr. 1026-1053).

The testimony was immaterial, irrelevant, incompetent and prejudicial for the reasons stated in Assignment No. 8.

Assignment No. 10. The Trial Court erred in admitting over objection the testimony of Graves with respect to Johnson's lack of employment (Exception No. 100, Tr. 1234-1235).

The testimony was immaterial, irrelevant, incompetent and prejudicial for the reasons stated in Assignment No. 8.

Assignment No. 11. The Trial Court erred in admitting over objection the testimony of one Kuhn with respect to the time when certain oxidation patterns first appeared on Johnson's hand (Exceptions No. 74, Tr. 1081; No. 75, Tr. 1082; and No. 76, Tr. 1083).

The testimony was without foundation, and was incompetent, irrelevant and immaterial and prejudicial.

Assignment No. 12. The Trial Court erred in denying the motion for new trial of defendant Johnson based on the admission into evidence of said statement of Johnson to Detective Lt. Donovan (Exception filed July 7, 1965 to Findings, Rulings and Order of the Court denying motion for new trial).

The grounds set forth in support of Assignment No. 7 required that in the light of the law applicable as of the time of the said motion a new trial be granted.

Assignment No. 13. The Trial Court erred in failing to instruct the jury that they should disregard Johnson's statement to Detective Lt. Donovan unless they found it was made voluntarily.

No exception was taken in this respect but this assignment of error is made in the interests of justice.

Assignment No. 14. In the interest of justice Johnson should receive a new trial separate from that of defendant Graves.

The statement of Graves which was introduced in evidence, albeit with a limiting instruction, followed by Graves' testimony in defense, deprived Johnson of a fair trial.

By his attorney, /s/ John M. Harrington, Jr.

Nov. 8, 1965—Filed.

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH, AT BOSTON,

April 4, 1967.

IN THE CASE OF

COMMONWEALTH,

VS.

RONALD L. JOHNSON & another
(and four companion cases)

pending in the Superior Court for the County of Suffolk.

ORDERED, that the following entry be made in the docket; viz.,—

Judgments affirmed.

By the Court, /s/ Richard A. McLaughlin, Clerk.

April 4, 1967

A true copy, Attest:

Richard A. Laughlin, Clerk of the Supreme Judicial Court for the Commonwealth May 18, 1967.

COMMONWEALTH,

vs.

RONALD L. JOHNSON & another [1]
(and four companion cases [2]).

KIRK, J. The two defendants were indicated, tried and found guilty of murder in the first degree of James B. O'Leary. The jury recommended that the death penalty not be imposed on Graves; no recommendation was made as to Johnson. On a separate indictment Johnson was found guilty of armed robbery, while masked, of Jacob Berman; Graves was found guilty of armed robbery of Berman. Both defendants were found guilty of assault and battery on Berman by means of a dangerous weapon. Johnson, in addition, was found guilty of unlawfully carrying a firearm, and unlawfully having a firearm under his control in a vehicle. The trial was held subject to G. L. c. 278, §§ 33A-33G, and the cases are here on appeal with assignments of error.

The trial commenced January 13, 1964, and was concluded January 25, 1964. The evidence showed that about 9 P.M. August 1, 1963, Berman was the sole employee then on duty at the Copley Wine and Liquor Company, Boylston Street, Boston. Johnson, wearing a mask and armed with a revolver, entered the store, struck Berman on the cheekbone with the revolver, ordered two customers to lie on the floor, and took money which he forced Berman to remove from the cash register. After Johnson left the store he was pursued by Berman and others via Exeter, Newbury and Fairfield streets to Commonwealth Avenue across the Mall. Boston Police Officer James B. O'Leary, who had joined the pursuit at the intersection of Exeter and Newbury streets, followed Johnson diagonally across Commonwealth Avenue. Johnson entered on the passenger side of a two-toned Buick convertible which was stopped in

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[1] Herbert Graves, Jr.

[2] Two companion cases are by the Commonwealth against Ronald L. Johnson and Herbert Graves, Jr., and two companion cases are by the Commonwealth against Ronald L. Johnson.

the outbound lane on Commonwealth Avenue. The car was being driven by Graves, to whom Johnson had recently transferred ownership. Graves knew that Johnson had a gun and that he was going to hold up the liquor store. Graves expected to receive half of the money. He had remained in the car, which was parked around the corner from the store, while Johnson went into the store. When he saw the commotion near the store, he started the car and drove outbound on Commonwealth Avenue. Graves stopped the car when Johnson came across the Mall on Commonwealth Avenue.

Officer O'Leary approached the car and ordered Graves out of the vehicle. O'Leary then proceeded to the passenger side of the vehicle. As he did so, two shots rang out. O'Leary, mortally wounded, fell to the street. Graves leaped from the driver's side of the car and ran along Fairfield Street, then through an alley to Gloucester Street, where he hailed a taxi which took him to the place where Johnson lived in Roxbury. Johnson drove off in the car. Police officers, alerted by the police alarm, saw Johnson in the Fenway and pursued him through several streets in the Fenway and Roxbury areas. In the course of the chase the car driven by Johnson struck a wall, hit four or five motor vehicles, and finally came to a halt after crashing into a bus. The front of the Buick was demolished. Johnson, limping, fled from the Buick and went over a fence. He was eventually apprehended under a back porch where he had sought concealment.

Officer O'Leary, in the meantime, had been taken to the Massachusetts General Hospital where, shortly before 3 A.M. on August 2, 1963, he was pronounced dead of gunshot wounds. Ballistics evidence showed that the bullet removed from O'Leary's body had been fired from the .38 calibre Smith & Wesson revolver which had been found beneath the Buick convertible after the collision with the MTA bus.

Johnson's Assignments of Error

1. We deal first with those assignments of error (6, 7, 12, 13) which relate to a statement amounting to a confession made to the police by Johnson after his arrest, at a time when he was not represented by counsel. The statement was stenographically taken and transcribed.

When the statement was offered at the trial, Johnson objected to its admission in evidence. A voir dire was held.

At the voir dire a question asked by the defendant of a doctor called by him was excluded (assignment 6). There was no error. The doctor, who had seen Johnson for the first time on August 15, 1963, at the Boston City Hospital, made a diagnosis on August 16, 1963, that Johnson was suffering from a subdural hematoma. The diagnosis was confirmed by an operation performed on August 17. In the opinion of the doctor the condition had existed for one or two weeks. The excluded question was whether the doctor had "an opinion as to the cause of this subdural hematoma." There is no indication that the doctor was aware of any set of facts, hypothetical or otherwise, upon which he could predicate an opinion which would have relevance to Johnson's physical condition on August 1 or 2, 1963. Despite the judge's suggestion, no offer was made which would aid the judge in determining whether, if the witness had an opinion of the cause of Johnson's condition on August 15, 1963, it related to the events of August 1 or 2. Cf. *Commonwealth* v. *Banuchi*, 335 Mass. 649, 653-654; *Commonwealth* v. *Burke*, 344 Mass. 243, 246.

There was no error in the judge's ruling at the completion of the voir dire that Johnson's statement to the police was admissible in evidence (assignment 7). When the statement was sought to be introduced at trial, it was prima facie voluntary. *Commonwealth* v. *McGarty*, 323 Mass. 435, 438. *Commonwealth* v. *Beaulieu*, 333 Mass. 640, 655. The burden was on the defendant to show that the statement was not voluntarily made. *Commonwealth* v. *Sheppard*, 313 Mass. 590, 604. The only ground upon which the defendant objected to its admission was that it "was involuntarily given because of physical force applied to the defendant by the police." The question was one of fact to be decided by the judge in the first instance. The judge found, after hearing, that there had been no physical coercion of the defendant. In a statement of findings subsequently filed (*Commonwealth* v. *Cook*, Mass. , - *) the judge stated that Johnson's testimony that the statement had been made because of physical abuse or threats of abuse by the police

* Mass. Adv. Sh. (1966) 1103, 1105-1106.

was "unreliable and not believable." Since the evidence upon which the defendant relied to exclude the statement was found unworthy of belief, the judge properly concluded that the statement was admissible.

The defendant argues that there was error (assignment 13) in that the judge, after ruling that Johnson's statement was admissible, did not instruct the jury to disregard it unless they found it was made voluntarily. No exception was saved at the trial. The defendant argues, however, that the "interests of justice" require that the assignment be considered and a new trial ordered. Although an assignment of error not based on an exception brings nothing to this court for review, *Commonwealth* v. *Chester*, 337 Mass. 702, 703, and cases cited, we have considered the issue in light of the broad power conferred on us under G. L. c. 278, § 33E.

We find no basis for disturbing the verdicts on the assigned ground. Although the judge may pass upon the voluntariness of a statement in the first instance, the final determination is one of fact for the jury. *Commonwealth* v. *Makarewicz*, 333 Mass. 575, 858. In the cases before us, after the judge found that the statement was voluntarily made, the voluntariness of the statement was not thereafter challenged at the trial. No evidence was presented to the jury from which they could find that the statement was involuntarily made. When the parties rested, the judge conferred with counsel about arguments and the charge. At the conference, there was no mention of the issue of the voluntariness of Johnson's statement. There was no request for an instruction regarding it. Johnson's counsel made no reference to the issue in his argument to the jury, which was mainly a plea that the death penalty not be imposed. No exception was taken to the judge's charge.

It seems clear to us from the transcript that the defendant was content to let the issue of voluntariness rest on the ruling made by the judge in the absence of the jury. The alternative was to revive and emphasize the issue by having the judge instruct the jury that, having heard the evidence on the voir dire, he had determined that the statement was voluntarily made, and by the further instruction that the jury could find that it was involuntary if there was evidence presented to them which persuaded them

to that conclusion, when in fact there was no such evidence before the jury. The defendant's conduct of his cases indicates a deliberate decision not to press the issue of involuntariness when it could have been raised seasonably before the jury. "It is well settled that a party cannot reserve for a motion for a new trial a point that he could have raised at the trial." *Commonwealth* v. *Doyle,* 323 Mass. 633, 638, and cases cited. This rule has particular pertinency when the point now argued was omitted not by the oversight, but by the purpose, of counsel. The representation implied in the conduct of the defence was that the issue of voluntariness was not in controversy. The judge was therefore under no duty to charge the jury on that issue. See *Dalton* v. *Post Publishing Co.* 328 Mass. 595, 598-599; *Commonwealth* v. *Kiernan,* 348 Mass. 29, 58.

Assignment of error 12 relates to the denial of the defendant's motion for a new trial. The motion was made by newly engaged counsel eight months after the verdicts of guilty and was based upon *Escobedo* v. *Illinois,* 378 U.S. 478, which had been decided subsequent to the trial of the case. The defendant's contention was that he had requested and been denied counsel prior to the time that his statement was given to the police. The judge, after hearing, expressly found that Johnson had made no request for counsel, and denied the motion. The defendant now advances two arguments under this assignment of error.

The defendant's first argument is that the principle in *Miranda* v. *Arizona,* 384 U.S. 436, decided subsequent to the trial and subsequent to the hearing on the motion for a new trial, should be given retroactive application. The argument is disposed of, adversely to the defendant, by our recent decisions to the contrary. See *Commonwealth* v. *Morrissey,* Mass. , - ;[a] *Commonwealth* v. *McCambridge,* Mass. , - ;[b] *Commonwealth* v. *Rogers,* Mass. , - ;[c] *Commonwealth* v. *McGrath,* Mass. , - ;[d] *Commonwealth* v. *O'Toole,* Mass. , .[e]

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[a] Mass. Adv. Sh. (1967) 11, 13-16.
[b] Mass. Adv. Sh. (1967) 23, 26-27.
[c] Mass. Adv. Sh. (1967) 29, 35-36.
[d] Mass. Adv. Sh. (1967) 41, 44-45.
[e] Mass. Adv. Sh. (1967) 149, 152.

The defendant's second argument is that the judge failed to consider important factors on the question of voluntariness which would call for a determination that Johnson's statement was involuntary. These include the failure to warn Johnson of his rights, the mentality of the accused, and Johnson's physical condition at the time he gave his statement to the police. The factors which the defendant now points to could have been raised at the trial. It was incumbent upon the defendant to do so. The failure to raise them during the voir dire, coupled with the fact that the issue of voluntariness was not thereafter pursued at the trial, leads us to conclude that there was no error. *Commonwealth* v. *Doyle,* 323 Mass. 633, 638. *Commonwealth* v. *Fancy,* 349 Mass. 196, 206.

We note further, however, that the factors to which the defendant now points as bearing upon the voluntariness of Johnson's statement were considered and passed upon by the judge during the hearing on the motion for a new trial. In addition to the evidence introduced, the judge had full opportunity to observe Johnson's mental capabilities. He was also aware of Johnson's physical condition at the time the statement was given to the police. The Judge's extensive findings of fact show that he was not required, as matter of law, to conclude that the statement was involuntarily given. See *Commonwealth* v. *Lundin,* 326 Mass. 551, 555; *Commonwealth* v. *Beaulieu,* 333 Mass. 640, 653-654; *Commonwealth* v. *Valcourt,* 333 Mass. 706, 711; *Commonwealth* v. *Harrison,* 342 Mass. 279, 284-285; *Commonwealth* v. *Tracy,* 349 Mass. 87. The question was one of fact. The denial of the motion for a new trial shows that the judge was unpersuaded by the new evidence concerning voluntariness and left undisturbed his finding at the voir dire that Johnson's statement was "freely and competently" given.

2. Assignment 3 is based upon Johnson's exception to the question asked of one Gannon regarding the identity of the gunman in the store. Gannon had testified that he was a customer in the store when the man, whose face was partly concealed by a dark blue bandanna handkerchief, "rushed through the store," gun in one hand, bag in the other, and demanded money of Berman; that the man struck Berman on the head with the gun and ordered Gannon to lie on the

floor. Gannon also described the build and appearance and apparel worn by a man whom he had seen outside the store just before Gannon entered the store. During a rapid series of questions, objections, rulings and comments by court and counsel relating to whether the gunman was the same man, Gannon was asked by the judge, "Can you say that you saw the same man?" Gannon answered, "I cannot say it was the same man." Later in his testimony Gannon testified that he had identified Johnson in a police lineup as the man he saw in the store. Toward the close of his testimony on direct examination Gannon was asked: "[W]as the man that you saw outside the store or on the sidewalk a few doors from the liquor store, to the best of your knowledge, belief and recollection, the man that you saw rush by you in the store and approach Mr. Berman and do what you described?" Over objection and exception, Gannon answered, "Yes." The defendant argues that the question was objectionable as a "leading and catchall question." The question was within the wide discretion which as matter of practical necessity we have recognized must be left to the trial judge, *Guiffre* v. *Carapezza*, 298 Mass. 458, 460, *Commonwealth* v. *Simpson*, 300 Mass. 45, 51, *Commonwealth* v. *Sheppard*, 313 Mass. 590, 597, who should not be fettered by a set of inflexible rules in getting competent testimony to the jury. The witness's reply to the question earlier put by the judge could have been construed by the judge as an implied expression of unwillingness to swear as matter of absolute and ultimate truth that the man seen inside and the man seen outside the store were one and the same. The question propounded by the prosecutor restored the inquiry on the issue of identity to its proper evidential perspective.

We see no merit whatever in assignment 5 which is based on Johnson's exceptions to brief testimony relative to the place where Officer O'Leary fell, the posture of his body, the surgical efforts to save his life and the course of the bullets through his body. It was incumbent upon the Commonwealth to prove that the officer died as the result of a gunshot wound caused by a bullet from a weapon fired by Johnson. The testimony objected to provided important

links in the prosecution's chain of proof and was properly admitted.

In support of the indictment charging robbery the Commonwealth introduced evidence through the testimony of an automobile salesman (assignments 8, 9, 10). The salesman had three conversations with Johnson, two on July 31, 1963, and one on August 1, 1963, regarding the purchase by Johnson of an automobile for $1,695. On July 31 Johnson said he would turn in his 1955 Buick, together with an amount of cash to make a total down payment of $300. He stated then that he had "no visible means of support." He give the salesman a credit statement. On August 1, 1963, the salesman informed Johnson that the finance company wanted a larger down payment. Johnson replied "that he was getting more money that night," that "he would have a substantial amount" of money, and would "be in [to the agency] on the following day and settle up on the automobile." There was no error in admitting this evidence, which tended to establish a motive for the crime. Although motive is not an essential element of a crime, and proof of it is not required, evidence tending to show motive is always competent because, if clearly shown, it may help to confirm the conclusion reached from all the other evidence that the defendant is guilty of the crime charged. *Commonwealth* v. *Simpson,* 300 Mass. 45, 56.

The remaining assignment of error (14) argued by Johnson is that he should be granted a new trial separate from that of Graves because of the prejudicial effect of the admission of Graves' statement, amounting to a confession, in evidence. Johnson was given and exercised the opportunity before trial to examine the statement incriminating him which Graves had given to the police. He made no motion that the trial be severed from that of Graves. He took no exception to the admission of Graves' statement in evidence at the trial. The judge correctly instructed the jury of the limited effect of the statement (*Commonwealth v. Millen,* 289 Mass. 441).

GRAVES' ASSIGNMENTS OF ERROR

There was no error in leaving to the jury the question whether Graves was guilty of murder in the first degree (assignment 4). It is conceded in Graves' brief that he was

engaged with Johnson in the joint enterprise to commit armed robbery, that Graves drove the getaway car from the scene of the robbery to the point where Officer O'Leary, while in fresh pursuit of Johnson, was killed. Graves argues, however, that before the killing he had "completely 'detached' " himself from the enterprise by submitting to arrest at the order of Officer O'Leary. The issue was one of fact as to which the judge gave full and correct instructions to which no exceptions were taken. See *Commonwealth* v. *Green*, 302 Mass. 547, 554-555; *Commonwealth* v. *Lussier*, 333 Mass. 83, 90; *Commonwealth* v. *Dellelo*, 349 Mass. 525, 529-531.

Graves' assignments of error 5 (no severance of trials) and 6 (admission of Johnson's confession) are disposed of by applying to them what we have said regarding the corresponding contentions of Johnson in his assignment of error 14.

Judgments affirmed.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967—281-714/589

Supreme Court of the United States

No. 291 Misc. , October Term, 19 67

Ronald L. Johnson,

Petitioner,

v.

Massachusetts

On petition for writ of Certiorari to the Supreme Judicial --- Court of the ~~State of~~ Commonwealth of Massachusetts.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby ~~denied~~. granted. The case is transferred to the appellate docket as No. 702.

And it is further ordered that the duly certified copy of the transcript of the proceedings which accompanied the petition shall be treated as though filed in response to such writ.

October 9, 1967

File No. .....

Supreme Court of the United States

OCTOBER TERM, 19.....

Term No. .....

ORDER ON FORMA PAUPERIS MOTION AND PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States.

OCTOBER TERM, 1967.

~~No. 291, Misc.~~ No. 702

RONALD L. JOHNSON,
Petitioner,

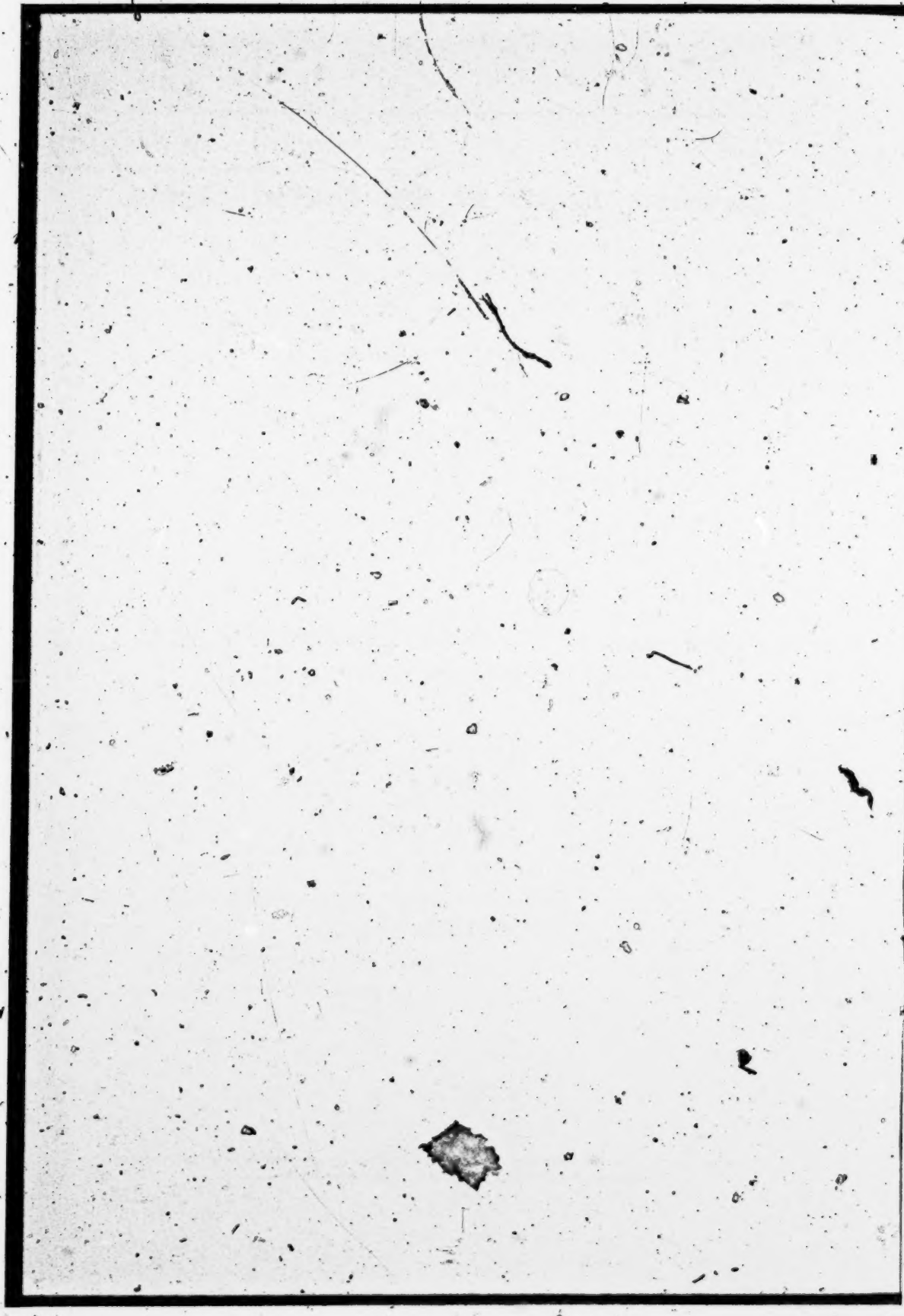
v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ELLIOT L. RICHARDSON,
Attorney General,
BRIAN E. CONCANNON,
Special Assistant Attorney General,
167 State House,
Boston, Massachusetts 02133,
Attorneys for Respondent.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.



Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 291, MISC.

RONALD L. JOHNSON,
Petitioner,
v.
COMMONWEALTH OF MASSACHUSETTS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Question Presented.

Whether the Massachusetts procedure followed by the courts below respecting admission of confessions violated the petitioner's Fourteenth Amendment rights.

Statement.

The Commonwealth adopts the facts in the statement of the petition, and adds thereto the following:

On the evening of August 1, 1963, immediately before colliding with a bus, the vehicle operated by the petitioner,

Ronald L. Johnson, crashed into a wall (Tr. 586-589) [1] and several automobiles. The impact of his vehicle upon the bus moved the bus several feet (Tr. 667).

After his apprehension Johnson thwarted each attempt by the police to warn him of his rights (N.T. Tr. 110).[2] When asked for his name and address he replied in foul and abusive language that he knew his rights and wasn't going to say anything to the police (N.T. Tr. 119). He asked challenging questions of identifying witnesses during the four police line-ups (R. 26,[3] N.T. Tr. 135, 245 *et seq.*).

Johnson had been a military prison guard in the United States Marine Corps (N.T. Tr. 410). When he refused to sign a statement at the book desk, he declared that he knew his rights (A. 6).[4] On prior occasions he refused to identify himself to police prior to arrest, saying that he was not required to do so (A. 6).

At the trial when the defense rested the judge conferred with counsel regarding arguments and instructions. At this conference there was no mention of the issue of voluntariness, nor was there a request for an instruction regarding it. See *Commonwealth* v. *Johnson,* 1967 Massachusetts Advance Sheets, pp. 581, 585 (B).[5]

Reasons for Not Granting the Writ.

1. The facts certainly do not compel the conclusion that Johnson's confession was not voluntary. He was not a

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[1] "Tr." refers to the typewritten "Transcript of the Evidence."

[2] "N.T. Tr." refers to the "Transcript of the Hearing of Motion for New Trial."

[3] "R." refers to the printed "Summary of Record and Assignment of Errors."

[4] "A" refers to Appendix A of the petition.

[5] "B" refers to Appendix B of the petition.

stranger to the criminal courts or to police procedures relative to persons suspected of crime. The questions which he asked the identifying witnesses show that he had an intelligent appreciation of his predicament. By his words and actions he effectively prevented the police from giving him the warning required by Massachusetts law. From all the circumstances it appears that the factual finding of voluntariness was not improper.

2. The issue of voluntariness is a factual one; the petitioner was given not one, but two, factual hearings on it. If the trial judge in making a decision after the first hearing emphasized the claim of a physical beating, it was because this was the only ground upon which the petitioner objected to the admission of the confession. From the lengthy findings upon the hearing of the motion for new trial it is clear that the judge meticulously considered all the circumstances in determining voluntariness.

The court below, although not bound by Massachusetts law to consider the question of voluntariness, *Commonwealth* v. *Chester,* 337 Mass. 702, 703, nevertheless did so. The Commonwealth relies heavily upon the opinion below in asking that the writ of certiorari not be granted.

3. In questioning the procedure used by Massachusetts in admitting confessions into evidence, the petition cites *Jackson* v. *Denno,* 378 U.S. 368. In that case this Court apparently approved the "Massachusetts procedure" in footnote to pages 378, 379, and 382. The petition relies upon statements in *Miranda* v. *Arizona,* 384 U.S. 436, for the proposition that the prosecution shall carry a heavy burden of proof on the issue of admissibility of a statement made by a defendant. But, as was pointed out in the opinion below, the *Miranda* principle does not apply to this case. See *Johnson* v. *New Jersey,* 384 U.S. 719, 721.

4. The Massachusetts procedure was followed in this case. The jury was free to reject the confession as involuntary. The trial judge was hardly obliged to instruct the jury on this issue where counsel for Johnson apparently did not wish the confession to be emphasized. See *Commonwealth* v. *Johnson, supra,* at pages 584 and 585.

Conclusion.

For the foregoing reasons, the respondent respectfully prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

ELLIOT L. RICHARDSON,
BRIAN E. CONCANNON,
Department of the Attorney General,
Commonwealth of Massachusetts.



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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 702

RONALD L. JOHNSON,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE PETITIONER

JOHN M. HARRINGTON, JR.
225 Franklin Street
Boston, Massachusetts
Attorney for Petitioner

JOHN A. PIKE
225 Franklin Street
Boston, Massachusetts
Of Counsel

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 702

RONALD L. JOHNSON,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Supreme Judicial Court of Massachusetts is reported at Mass. Adv. Sh. (1967) 581 (225 N.E. 2d 360) and appears in the Appendix, A. 335-343.[1] The

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[1] "A." refers to the Appendix; "Tr." refers to the typewritten "Transcript of the Evidence" (See Mass. G. L. c. 278 § 33C); "N. Tr." refers to the typewritten transcript of "Hearing on Motion for New Trial." "R." refers to the "Summary of Record and Assignment of Errors," which is a printed record as provided by Mass. G. L. c. 278, §§ 33C, 33E.

Findings, Rulings and Order of the Superior Court of Suffolk County, Massachusetts, on Petitioner's Motion for New Trial is set forth in the Appendix, A. 325-330.

Jurisdiction

The Order and Rescript of the Supreme Judicial Court of Massachusetts was entered on April 4, 1967 (A. 334). The order granting the motion for leave to proceed *in forma pauperis* and granting the petition for a writ of certiorari was granted on October 9, 1967. The jurisdiction of this Court is invoked under 28 USC 1257(3).

Constitutional Provisions Involved

The questions here presented involve principles of due process of law under the Fourteenth Amendment to the Constitution of the United States, in relation to the privilege against self-incrimination under the Fifth Amendment and the right to trial by jury under the Sixth Amendment.

Amendment V

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

Amendment VI

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

Amendment XIV

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

(1) Whether Petitioner's Fourteenth Amendment rights were violated by a conviction and sentence to death obtained on the basis of a confession which in the "totality of the circumstances" was not voluntary?

(2) Whether Petitioner's Fourteenth Amendment rights were violated by the failure of the Massachusetts courts to apply standards established by this Court in determining the voluntariness of Petitioner's confession?

(3) Whether Petitioner's Fourteenth Amendment rights were violated because the Massachusetts courts imposed on Petitioner the burden of proof on the issue of the voluntariness of his confession?

(4) Whether Petitioner's Fourteenth Amendment rights were violated by the failure of the Trial Judge to submit to the Jury the issue of the voluntariness of Petitioner's confession?

Statement of the Case

The Petitioner, Ronald L. Johnson, was tried, together with one Graves, before Murray J.[2] and a Jury in the Suffolk Superior Court, beginning on January 13, 1964, on six indictments, respectively charging him and Graves with murder in the first degree (A. 12), charging him with armed robbery while masked and Graves with armed robbery (A. 13-14), charging him with unlawfully carrying a firearm (A. 15), charging him and Graves with conspiracy to commit armed robbery (Tr. 41-42), charging him and Graves with unlawfully carrying a revolver in a vehicle (A. 16-17), and charging him and Graves with assault and battery by means of a dangerous weapon (A. 18).

At the close of the evidence the trial judge directed verdicts of not guilty for both defendants on the conspiracy indictment and directed a verdict of not guilty for Graves on the indictment for carrying a revolver in a motor vehicle (Tr. 1443-1444).

The Jury on January 25, 1964 returned verdicts of guilty as to both defendants on all of the remaining indictments, with a recommendation that the death penalty not be imposed as to Graves (Tr. 1439-1442).

Thereafter on the indictment for murder Johnson was sentenced to be electrocuted (A. 239) and on the remaining indictments was sentenced to serve concurrent prison terms of varying length (R. 38, 46, 54, 62).

Testimony of witnesses at the trial was to the effect that, on the evening of August 1, 1963, Johnson, wearing a mask

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[2] Now a Judge of the United States District Court for the District of Massachusetts.

and armed with a revolver, held up the Copley Wine & Liquor Company in Boston, Massachusetts (Tr. 193-206); that upon leaving the store he was pursued by Officer O'Leary and others (Tr. 207-217, 403, 457); that Johnson entered an automobile on Commonwealth Avenue and as Officer O'Leary approached the automobile, he was shot twice and mortally wounded (Tr. 359-360, 459-460, 508 et seq.); and that Johnson drove off in the car but was pursued by the police and ultimately apprehended after the car driven by him came into collision with a bus (Tr. 459-461, 586-594).

After his apprehension Johnson was taken by police to Division 10 where he was booked at 9:35 P.M. (A. 325-326). He was thereafter taken to police headquarters (A. 326). He was placed in several police lineups between approximately midnight and 4:00 A.M. on August 2, and various witnesses who observed Johnson testified at the trial that he was bleeding on and around the head as he was in the lineups (A. 28-30, 36-38, 41-46, 48-51, 60-61, 326).

In these lineups, and elsewhere, he was repeatedly confronted by Lt. John J. Donovan of the Boston Police Department with statements of persons identifying him and asked if he had any response (A. 288-294, 302-310, 320-321). At about 5:50 A.M. on August 2, after the last such lineup and in response to the inquiry of Lt. Donovan, Johnson gave a question and answer statement amounting to a confession to Lt. Donovan at Boston police headquarters, which was recorded by a police stenographer (A. 191-201, 329). Johnson first saw a lawyer about three hours after his confession (A. 242-243).

Johnson's confession was admitted into evidence at his trial over his objection that the confession was involun-

tarily given because it was coerced from him by physical force applied by the police (A. 188 et seq.). He testified at a *voir dire* hearing held before the Trial Judge (A. 96 et seq.) that he was severely beaten by various police officers (A. 109 et seq.); various police officers testified that Johnson was not beaten (A. 170 et seq.). Dr. Lawrence M. Robertson, Jr. testified that on August 17, 1963 he operated on Johnson at Boston City Hospital for a subdural hematoma, which is a collection of blood between the dura and the brain which could have been there for one to two weeks (A. 166-170).

At the close of the *voir dire* hearing the Trial Judge ruled "I am not satisfied from the evidence that it was not freely and competently given, and, therefore, I rule that it is admissible."

Thereafter, over objection, the confession was read into evidence and exception taken thereto (A. 190-201). It affirmatively appeared at the trial that Johnson was not advised at the time of his confession of his right to be silent or that what he said might be used against him or of any right to counsel and there was no evidence that he was so cautioned or advised at any other time. It affirmatively appeared at the trial that the only person present at the time of confession were policemen and the police stenographer. The Trial Judge's charge to the Jury included no reference whatsoever to the question of the voluntariness of Johnson's confession (A. 207-239). (No request was made to charge on this issue and no exception was taken to the charge.) The Jury found Johnson guilty and he was sentenced to death (A. 261).

On October 1, 1964 present counsel for Johnson[3] filed a Motion for a New Trial based on the admission into evidence of Johnson's confession to Lt. Donovan (A. 240). Further evidence was taken as to the circumstances of Johnson's arrest and subsequent events leading up to his confession (A. 244-285).

In his Findings, Rulings and Order on the Motion for New Trial (A. 325-330) the Trial Judge found (A. 329):

> "No police officer told the defendant at any time, from the time he was taken into custody at the rear of 20 Fenwood Road until he completed his statement to Lieutenant Donovan, that he had 'the right' to remain silent, or 'the right' to refuse to answer any questions put to him by the police, or that anything he said to the police might or could be 'used against him'. During the lineup, the defendant heard several persons identify him as the man involved in the shooting on Commonwealth Avenue. He asked certain questions challenging the accuracy or credibility of the identification by some, without effecting any change by the identifying witnesses. After the last of the four lineups, he said to Lieutenant Donovan, in response to the latter's inquiry, that he would talk to him. At that time the defendant had become, together with Herbert Graves, the prime suspect in the felonious homicide of Officer James B. O'Leary. I find that his willingness to talk to Lieutenant Donovan at this time was not a waiver of any 'right' he had to remain silent and to

[3] On May 29, 1964 Johnson complained to the Chief Justice of the Superior Court of his assigned counsel's conduct of his defense at trial. On June 16, 1964 present counsel was assigned by the Trial Judge to represent Johnson in further proceedings (A. 7).

refuse to talk to the police at that time or to be cautioned by the police at that time of such 'rights', if it should be determined that in the circumstances he had any one or all of such 'rights'. Whatever his declarations were at other times concerning his rights *vis a vis* the police, I am not satisfied that he knew what his rights were at the time of the interrogation."

The Trial Judge also found that Johnson did not, as he testified, ask for counsel, and denied the Motion for New Trial (A. 330).

On appeal to the Supreme Judicial Court Johnson assigned as errors, among other things, the admission of his statement over objection (Assignment No. 7, A. 332), the denial of his Motion for New Trial based on the admission of the statement (Assignment No. 12, A. 333) and the failure to instruct the Jury on the issue of voluntariness with the related question of the burden of proof on the issue of the voluntariness of Johnson's confession (Assignment No. 13, A. 333).

The Supreme Judicial Court of Massachusetts affirmed the Judgment of the Superior Court (A. 335) stating *inter alia*:

* * * * *

"When the statement was sought to be introduced at trial, it was prima facie voluntary. *Commonwealth* v. *McGarty,* 323 Mass. 435, 438. *Commonwealth* v. *Beaulieu,* 333 Mass. 640, 655. The burden was on the defendant to show that the statement was not voluntarily made." *Commonwealth* v. *Sheppard,* 313 Mass. 590, 604. (A. 337)

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"Although the judge may pass upon the voluntariness of a statement in the first instance, the final determination is one of fact for the jury." (A. 338)

* * * * *

"No evidence was presented to the jury from which they could find that the statement was involuntarily made." (A. 338)

* * * * *

"The defendant's second argument is that the judge failed to consider important factors on the question of voluntariness which would call for a determination that Johnson's statement was involuntary. These include the failure to warn Johnson of his rights, the mentality of the accused, and Johnson's physical condition at the time he gave his statement to the police. The factors which the defendant now points to could have been raised at the trial. It was incumbent upon the defendant to do so." (A. 340)

Summary of Argument

The Petitioner's rights under the Fourteenth Amendment to the Constitution of the United States were violated by the admission into evidence at his trial, over objection, of a confession he had given to the police.

In the totality of the circumstances, as shown on those facts which are undisputed, the confession was, as a matter of constitutional law, involuntary. The confession was taken from the defendant who was in custody, alone with the police, ignorant and injured, after incriminating lineup procedures, without any warning whatsoever of his rights and without friend or counsel. The facts show that by un-

deviating purpose the police made of the man they had charged more than eight hours earlier, an instrument for his own conviction (*infra*, at pp. 11-18).

Moreover, the Petitioner's rights under the Fourteenth Amendment were violated in that, as shown by the record, neither the Trial Judge nor the Supreme Judicial Court of Massachusetts ever made a determination of the issue of voluntariness according to the standards which have been laid down by this Court. The record below demonstrates this plainly for, among other things, the Trial Judge stated expressly that he was not certain the defendant had the right to be warned and to remain silent in these circumstances, and the Supreme Judicial Court asserted that there was no evidence of involuntariness before the Jury, ignoring substantial evidence before the Jury on factors which this Court has held relevant to voluntariness (*infra*, at pp. 18-22).

Additionally, both the Trial Judge and the Supreme Judicial Court of Massachusetts applied a rule that the confession was presumed to be voluntary when offered and that the burden of showing involuntariness was on the defendant. This rule, which is followed in only seven of the fifty states and is contrary to the rule in the federal courts, is at variance with the constitutional principles which have evolved with respect to the use of confessions, which give the citizen a right to be tried free of self-incrimination by a confession unless the confession is shown to be free and voluntary. This right is of fundamental importance and must not be vitiated by putting the burden on the defendant who, particularly in a case such as this, is at a marked disadvantage at carrying that burden in relation to the prosecution (*infra*, at pp. 23-27).

Finally, the issue of voluntariness was not submitted to the Jury. The conclusion of the Court below that this point was waived is not supported by the record or its own reasoning and, absent waiver, a defendant, as a matter of constitutional law, should not be deprived of his right to have a jury, properly instructed, pass on the issue of the voluntariness of a confession (*infra*, at pp. 28-34).

ARGUMENT

I.

On the Undisputed Facts the Confession Was Not Voluntary.

The totality of the circumstances, evidenced by undisputed facts and wholly apart from the disputed facts as to police brutality,[4] compel the conclusion that Johnson's confession was not voluntary.[5] Johnson is a Negro with barely a sixth grade education and an I.Q. of 86 (A. 23-24). He was separated from the military service under United States Marine Corps General Order #157 because of scores on "Classification Aptitude and Trade Tests" toward the bottom of the next to lowest category of test scores

[4] At the *voir dire* on the admissibility of the confession there was dispute as to police brutality leading to the confession. "Such disputes . . . are an inescapable consequence of secret inquisitorial practices. And always evidence concerning the inner details of secret inquisitions is weighted against an accused, particularly where, as here, he is charged with a brutal crime . . . ." *Ashcraft* v. *Tennessee*, 322 U.S. 143, 152-153.

[5] As hereinafter appears, on the face of the record, the totality of the circumstances were not considered at any point in the proceedings below.

and far below the minimum scores then required for retention in that military service (A. 323-324).[6]

At the time he made his confession to the police Johnson had been in custody, indeed engulfed in a sea of policemen, for about eight and one-half hours, had been in numerous lineups, was injured and without sleep and subjected to frequent questioning and confrontations with witnesses. At the hearing on the Motion for New Trial no less than 32 police officers testified as to being in contact with Johnson during the course of the night and the record indicates there were many others. Police Officer Miller testified that there were many officers there that night (A. 297-298), Officer Donnelly that there were dozens of officers, the entire robbery squad was called in (A. 299), Officer Indignaro that there were 40-50 officers in the lineup room (A. 305), and Officer Glynn that there were 50-100 officers in the lineup room (A. 318). A more "police-dominated atmosphere" could scarcely be imagined. See *Miranda* v. *Arizona*, 384 U.S. 436, 445 and 456.

Between approximately midnight and the time he confessed Johnson was in four police lineups[7] (A. 326). Sev-

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[6] Cf. *Gallegos* v. *Colorado*, 370 U.S. 49, 54, where it was said that "we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights." Also cf. *Davis* v. *North Carolina*, 384 U.S. 737 (impoverished Negro with third or fourth grade education); *Townsend* v. *Sain*, 372 U.S. 293 (19 year old drug addict under possible influence of a "truth serum"); *Reck* v. *Pate*, 367 U.S. 433 (19 year old high grade mental defective, sick, hungry); *Blackburn* v. *Alabama*, 361 U.S. 199 (one hundred per cent mental incompetent probably "insane" at time of confession); *Fikes* v. *Alabama*, 352 U.S. 191 ("highly suggestible" uneducated defendant of low mentality).

[7] If either *Miranda* v. *Arizona*, *supra*, or *United States* v. *Wade*, —— U.S. —— (6/12/67), and *Gilbert* v. *California*, —— U.S. ——

eral witnesses who observed him in the lineups testified that he was bleeding on and around the head, had other cuts and scrapes on his body and that his clothing was shredded and torn (A. 28-30, 36-38, 41-46, 48-51, 60-61).

Repeatedly during the lineups (and in at least one instance outside the lineup (A. 288-289)), Johnson was confronted by Lt. John J. Donovan of the Boston Police Department with witnesses identifying him and asked if he had anything to say. At each confrontation police stenographers, who were not identified as such to Johnson, recorded the identifications, questions by Lt. Donovan and Johnson's replies (A. 288-294, 302-310, 320-321). At no such confrontation was Johnson at any time warned of his right to remain silent, that statements he made might be used against him and that he had right to counsel. These confrontations were not for the purpose of confirming identification but, without question, were intended to elicit in-

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(6/12/67), had retroactive effect Johnson would, on the basis of these cases alone, be entitled to a new trial. This case combines all features condemned in each of those cases. It is obvious that some highly "suggestive procedures" were used in the four police lineups in which Johnson appeared since citizens identifying him noted his extensive injuries and torn-up clothing. One witness testified that although she had indicated prior to the lineup that she would identify a Negro, several of the men in the lineup were white (A. 37); another that his identification was based on Johnson's build and that no other person in the lineup had a similar build (A. 29), and another that his attention was called to Johnson because he was pushed into the lineup (A. 43-46). Indeed, Johnson was confronted by certain witnesses and as the Trial Judge found "After the last of the four lineups, he said to Lt. Donovan, in response to the latter's inquiry, that he would talk to him" (A. 329). Obviously this was a most critical step in the prosecution of Johnson, and presence of counsel was absolutely essential to combat these and any other "suggestive procedures" now lost to the record. In fact, counsel for Johnson was first assigned on October 11, 1963, some three months after he was taken into custody (A. 2).

criminating statements from Johnson[8] and lay the foundation for a confession. Moreover, it is significant that by his responses in these confrontations Johnson continued to deny his guilt at least through about 4 A.M. the time of the last such lineup.[9]

After the last lineup and in response to inquiry of Lt. Donovan who supervised the lineups and the confrontations, Johnson gave a confession to Lt. Donovan (A. 329).

Johnson's injuries, as testified to by witnesses *at trial*, were substantial. As prosecution witness Mary A. Taylor described him in the lineup which she observed at about 4 A.M., "He had tattered pants on, and he was bleeding on the head, and he was scraped and everything all over his body. . . . I think at the knee, too" (A. 37). She was asked whether the blood was flowing from his head at that time, about 4 A.M. at the last lineup, some six and one-half hours after Johnson was booked and shortly before his confession, and answered: "I think it was, I am not sure" (A. 38). Prosecution witness Maurice J. Curran who observed Johnson at a lineup around 3 A.M. was asked whether the blood which he observed on Johnson's head was flowing and responded: "I don't recall it being clotted, anyway. I won't say it was flowing, but it seemed to be fresh, as I recall, it seemed to be reasonably fresh. I can't actually say whether it was flowing or not. . . ." (A. 43).

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[8] The law of Massachusetts is that while silence or unequivocal denial of a defendant under arrest is not admissible, an equivocal reply to an accusation is admissible. *Commonwealth* v. *Lucas*, 332 Mass. 594, 597-598 (1955).

[9] "In these circumstances [incommunicado incarceration] the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege." *Miranda* v. *Arizona*, *supra*, at 476.

A "Report to Department of Mental Health" dated August 16, 1963 on the mental examination of Johnson, as provided under Mass. G. L. c. 123, § 100A, stated that:

> "He has headaches and dizziness when he bends down and gets up. He had a blackout spell in the police station. Things appear blurry to him. He has vomited a couple of times" (A. 20).

Upon the basis of this report mental hospital observation was recommended (A. 20). On the same day as this report, August 16, 1963, just two weeks after Johnson's confession, he underwent a right carotid arteriogram which indicated a subdural hematoma, a collection of blood between the dura and the brain (A. 169). On the following day he was operated on and found to have a subdural hematoma which the operating physician, Dr. Lawrence M. Robertson, Jr., at the *voir dire* hearing testified existed for from one to two weeks (A. 169). Dr. Robertson was not allowed to state his opinion as to the cause of the hematoma (A. 169).

At no time prior to his confession was Johnson advised of his rights to remain silent and have counsel (A. 329). The Trial Judge, on the Motion for New Trial, expressly found that he was ignorant of his rights at the time of his confession (A. 329).[10] Notice as to his right to use the

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[10] The Trial Judge's finding that Johnson did not know his rights at the time of interrogation is confirmed by Johnson's confession where in response to a question he said: "I was up to the Savoy for a while. I picked up this girl. I don't have to give her name, do I?" See Note, *Developments in the Law—Confessions*, 79 Harv. L. Rev. 938, 981 (November, 1965): "The uncounseled suspect subjected to police questioning in a hostile atmosphere is likely to believe that there is an obligation to respond, even in the absence of coercive conduct by the police." And See *Culombe* v. *Connecticut*, 367 U.S. 568, 575 and *Miranda* v. *Arizona*, *supra*, at 467, "[W]ith-

telephone was not communicated to him as required by Massachusetts statutes (Mass. G. L. c. 278, § 33A) (A. 328). At no time prior to his confession did he consult with counsel or speak to anyone other than the police; in fact, only the police were present at the time of his confession (A. 97). The Trial Judge found that "At the time . . . (of his confession, he) had become . . . the prime suspect in the felonious homicide of Officer James B. O'Leary" (A. 329).

While the determination by this Court of the issue of voluntariness is not a matter of "color matching" from decided cases, *Reck* v. *Pate*, 367 U.S. 433, 442, the colors in decided cases have their reflection here in the limited mentality and education of the defendant, see *Ward* v. *Texas*, 316 U.S. 547, 555, *Fikes* v. *Alabama*, 352 U.S. 191, 196-197, *Davis* v. *North Carolina*, 384 U.S. 737, 742, *Clewis* v. *Texas*, —— U.S. —— (4/24/67); in the undeviating intent of the officers to obtain from the man they had already charged evidence on which to convict him, see *Spano* v. *New York*, 360 U.S. 315, 324; in the fact that the defendant was injured, see *Reck* v. *Pate*, *supra*, at 441-443, *Clewis* v. *Texas*, *supra*; in his custodial isolation, see *Watts* v. *Indiana*, 338 U.S. 49, 53, *Turner* v. *Pennsylvania*, 338 U.S. 62, 64, 67, *Clewis* v. *Texas*, *supra*; in the absence of counsel, see *Payne* v. *Arkansas*, 356 U.S. 560, 567, *Blackburn* v. *Alabama*, 361 U.S. 199, 207; and in the total failure of warning of his rights, see *Turner* v. *Pennsylvania*, *supra*, at 64, *Haynes* v. *Washington*, 373 U.S. 503, 510-511, *Davis* v. *North Carolina*, *supra*, at 740-741, *Clewis* v. *Texas*, *supra*.

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out proper safeguards [adequate warnings and right of counsel] the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely."

In addition to this accumulation of indicia of a will overborne the evidence taken as a whole plainly shows that this defendant was deliberately made the instrument of his own conviction. In the line of cases which begins with *Brown* v. *Mississippi*, 297 U.S. 278, there runs a dominant theme that in the end the issue of voluntariness comes down to the question of whether the circumstances show a contrivance to overbear the defendant's right to be silent, *Haley* v. *Ohio*, 332 U.S. 596, 607, see *Blackburn* v. *Alabama*, *supra*, at 206-207.

It is obvious that the police "interrogation [and, indeed, the confrontations with identifying witnesses which laid the foundation for the interrogation] was not intended merely to secure information," but as in *Clewis* v. *Texas*, *supra*, was "specifically designed to elicit a . . . statement." [11] Not only was Johnson's statement in response to leading questions and in question and answer form (see *Spano* v. *New York*, *supra*), but on its face it is a catalogue of admissions of the essential ingredients of each of the substantive crimes for which he was thereafter indicted (A. 191-199). In fact, the procedure of confronting him in lineups with identifying witnesses in circumstances appearing to require response from him (see *Bram* v. *United States*, 168 U.S. 532), while he was injured, not warned of his rights and ignorant of them, the prime suspect in the homicide, and in a "police-dominated atmosphere" without friend, advisers or counsellors and patently subject to the "complete authority and control" of the police (see *Bram*, *supra*,

[11] The police were "concerned primarily with securing a statement from defendant on which they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown this Court has held that the confession must be examined with the utmost careful scrutiny. . . ." *Spano* v. *New York*, *supra*, at 324.

at 563) can only have been for the purpose of breaking down his will to deny guilt (which it did) and of obtaining a confession. The undisputed facts evidence a situation so "inherently coercive" that in all the circumstances it cannot be said that Johnson's confession was made voluntarily.

II.

The Issue of Voluntariness Was Never Determined Below in Accordance With the Standards Laid Down by This Court.

With respect to several of the circumstances bearing on the voluntariness of Johnson's confession, the courts below plainly did not give them the weight required by this Court, or indeed did not give them any weight at all. At the *voir dire* hearing the Trial Judge determined the question of the voluntariness of Johnson's confession solely in the context of a claim of physical beating (see A. 337)[12] without consideration of his intelligence, physical condition, ignorance of and lack of warning as to his rights to remain silent, to refuse to answer questions and to communicate with counsel, or the inherently coercive nature of the situation wherein Johnson was alone amidst a veritable army of law enforcement officers (A. 189, 191-192, 325).

On the Motion for New Trial to the extent the Trial Judge considered any of these factors, he did so solely on

[12] That the Trial Judge determined the question at the *voir dire* hearing solely in the context of physical beating and on the Motion for New Trial solely on the question of the applicability of *Escobedo*, is not surprising in view of the Massachusetts rule that the confession is presumed voluntary and the burden is on the defendant to prove otherwise. See *infra*, at pp. 23-27. The Trial Judge apparently concluded (A. 189) that under this rule there was no obligation for him to consider matters other than those expressly referred to by Johnson's trial counsel in protesting voluntariness (A. 325).

the question of the applicability of *Escobedo* v. *Illinois*, 378 U.S. 478[13] and not on the question of voluntariness (A. 329-330). Clearly on the issue of voluntariness, the Trial Judge could not have considered Johnson's right to remain silent and to be cautioned by police as to his rights, since the Trial Judge's Findings, Rulings and Order show that the Trial Judge was apparently uncertain as to whether Johnson had such rights in the circumstances and in effect reserved that question to the appellate court (A. 329). These factors have taken on increasing significance. See *Miranda* v. *Arizona*, 384 U.S. 436; *Johnson* v. *New Jersey*, 384 U.S. 719, 730; *Davis* v. *North Carolina*, 384 U.S. 737, 740. See also *Clewis* v. *Texas*, —— U.S. —— (4/24/67).[14]

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[13] See footnote 12.

[14] These factors should have great weight in this case where Johnson claims physical coercion by police and that he requested counsel. After his arrest he had no access to persons other than the police and only his word against that of many policemen. "[A]ny protestations by the suspect of the fairness of the lineup made at trial are likely to be in vain; the jury's choice is between the accused's unsupported version and that of the police officers present." *United States* v. *Wade*, —— U.S. —— (6/12/67). How can Johnson, or any defendant, ever prove coercion in these circumstances; the police are not likely to testify to their own coercive acts; and in this case the automobile accident afforded obvious rationalization for Johnson's injuries, whether or not all resulted from the accident. (See dissenting opinions of Justice Douglas, *Crooker* v. *California*, 357 U.S. 433, 443-448 and Justice Black, *In re Groban*, 352 U.S. 330, 340-343.) In fact, there was testimony that, although Johnson was bleeding from the back of his head when booked at about 9:30 P.M., he had no swelling, bruises or cuts on his face at that time (A. 78, 80, 83, 86), but that later in the evening while in the lineups he had blood on the right side of his face (A. 42-43) and on his nose and mouth (A. 49-50) and his cheek was swollen (A. 50) from which it might be found that he received these added injuries while in custody. The report concerning Johnson, dated November 5, 1963, of Dr. Samuel Allen, Acting Director of Clinical Psychiatry, Massachusetts Correctional Institution, Bridgewater, to the Clerk of the Superior Court (A. 23) stated that: "He was treated at

On appeal the Massachusetts Supreme Judicial Court failed to recognize that the Trial Judge did not (and could not because he was uncertain Johnson had such rights) give the significant weight on the issue of voluntariness to absence of counsel and failure to warn of constitutional rights, now required by this Court. The Court did acknowledge that the Trial Judge's decision at the *voir dire* hearing was directed only to the question of physical coercion. It suggested, however, that Johnson somehow waived right to have these other factors considered on the issue of voluntariness, because they were not specifically raised by defense at trial.[15] But counsel objected to admission of the confession on the grounds of voluntariness and is entitled to have this issue determined, with proper weight given these factors, as that weight has been defined by this Court, even in opinions subsequent to Johnson's trial. *Rogers v. Richmond*, 365 U.S. 534. See *Johnson* v. *New Jersey, supra; Davis* v. *North Carolina, supra.*

While the opinion of the Supreme Judicial Court of Massachusetts observed that Johnson's mental capabilities and physical condition at the time of trial were known to the Trial Judge when he denied the Motion for New Trial, the Trial Judge's written decision on the Motion demonstrates that he concerned himself with the application of the *Escobedo* case—not the issue of voluntariness.

Boston City Hospital and Norfolk Prison Hospital for injuries sustained *after* his arrest." (Emphasis supplied.) In these circumstances the prosecution should have had the same heavy burden of proof on the elements of voluntariness it now has under the *Miranda* opinion with respect to waiver of right to counsel. See discussion below.

[15] See footnote 12, *supra.*

More significantly, the Supreme Judicial Court took no note of the fact that the absence of counsel and failure to warn were not considered on the issue of voluntariness by the Trial Judge—and could not have been because he was uncertain Johnson had such rights in the circumstances. Moreover, the Supreme Judicial Court did not itself consider these factors but affirmed solely on the basis of the Trial Judge's findings, stating that the "question was one of fact." Although the "basic facts on which coercion is ascertained" involve fact determinations, "the issue of coercion . . . involves the application of constitutional standards of fundamental fairness under the Fourteenth Amendment." *Thomas* v. *Arizona*, 356 U.S. 390, 393. It was incumbent upon the Supreme Judicial Court to ensure that in resolving this issue the Trial Judge take into account all relevant factors and follow the standards laid down by this Court. See *Haynes* v. *Washington*, 373 U.S. 503, 517-518.[16]

Indeed, it appears from the opinion of the Massachusetts Supreme Judicial Court that it was not aware of the significance placed by this Court on the absence of counsel and failure to warn in determining the voluntariness of a confession. Twice in its opinion that Court stated categorically that there was no evidence before the Jury on the issue of voluntariness (A. 338-339). And yet each of these factors of absence of counsel and failure to warn were in evidence before the Trial Judge and the Jury, in addition

[16] In *Reck* v. *Pate*, 367 U.S. 433, 454, Mr. Justice Clark in dissenting suggested that one of the factors underlying the result in *Turner* v. *Pennsylvania*, 338 U.S. 62, was that the Trial Judge refused to charge "that in considering the voluntariness of the confession the prolonged interrogation should be considered." At p. 65.

to certain testimony as to Johnson's injuries (A. 191-201, esp. at 201; see *infra,* at p. 32).

In short, at no point in the proceedings in the State Courts has the issue of the voluntariness of the confession been determined in the light of the standards set forth by this Court.

> "A defendant has the right to be tried according to the substantive and procedural due process requirements of the Fourteenth Amendment. This means that a vital confession . . . may go to the jury only if it is subjected to screening in accordance with correct constitutional standards. To the extent that in the trial of Rogers evidence was allowed to go to the jury on the basis of standards that departed from constitutional requirements, to that extent he was unconstitutionally tried and the conviction was vitiated by error of constitutional dimension." *Rogers* v. *Richmond, supra,* at 544-545.

III.

The Rule Employed Below That the Confession Was Presumed to Be Voluntary and That the Burden Was on the Defendant to Show That the Confession Was Not Voluntarily Made Violates Due Process of Law Under the Fourteenth Amendment.

In the case at bar the opinion of the Massachusetts Supreme Judicial Court stated that "the burden was on the defendant to show that the statement was not voluntarily made." The Trial Judge determined the voluntariness of Johnson's confession under Massachusetts law and stated that "The presumption is, under the law, that a confession is voluntary, unless it is overcome by evidence which shows it is not . . . (A. 139). I am not satisfied from the evidence that it was not freely and competently given, and therefore, I rule that it is admissible" (A. 189).[17]

In *Malloy* v. *Hogan*, 378 U.S. 1, this Court "squarely held the privilege [against self-incrimination] applicable to the States, and held that the substantive standards underlying the privilege applied with full force to state court proceedings. . . . [T]he reasoning in *Malloy* made clear what had already become apparent—that the substantive and procedural safeguards surrounding admissibility of confessions in state cases had become exceedingly exacting, reflecting all the policies embedded in the privilege.

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[17] Twenty-seven states place the burden of proof of voluntariness on the prosecution to a greater or lesser extent. Only Indiana, Iowa, Maine, Massachusetts, North Carolina, Ohio, and Oklahoma impose this burden on the defendant. See *Lyons* v. *Oklahoma*, 322 U.S. 596, 600-601 (1944). In five states the law is unclear and in the remaining states no case was found on point. For a survey of states, see Addendum to this Brief.

. . . " *Miranda* v. *Arizona*, 384 U.S. 436, 463-464.[18] While the *Malloy* opinion makes it clear that admissibility of a confession "in a state criminal prosecution is tested by the same standard applied in federal prosecutions" (referring to the *Bram* case) and it is clear that the prosecution has the burden of proving the voluntariness of a confession in federal prosecutions (see *Bram* v. *United States*, 168 U.S. 532, 549; *Wan* v. *United States*, 266 U.S. 1, 14), this Court has never held squarely that state prosecutions have this burden. In *Jackson* v. *Denno*, 378 U.S. 368, it left open this question, apparently because the New York rule there involved "put on the State the burden of convincing the jury beyond a reasonable doubt that a confession is voluntary." Justice Black dissenting in part and concurring in part, at 405.

In a case decided in this term, *Beecher* v. *Alabama*, —— U.S. —— (10/23/67), *per curiam*, Justice Brennan, joined by the Chief Justice and Justice Douglas, was of the opinion that the federal standards set forth in *Bram* applied equally in state prosecutions, quoting *Malloy* v. *Hogan*, *supra*, as follows:

> "Under this test, the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was 'free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . .' "

[18] "The decisions of this Court have guaranteed the same procedural protection for the defendant whether his confession was used in a federal or state court." *Miranda* v. *Arizona*, *supra*, Footnote 33.

Not only does the formulation of the issue contained in *Bram* of whether the confession was "free and voluntary", necessarily imply that the burden is on the prosecution, but that very case specifically held, with abundant citation of American, English and Irish authority that the burden was on the prosecution. *Beecher* also cited among other cases *Wan* v. *United States, supra,* which similarly placed the burden. Cf. *Teham* v. *United States ex rel. Shott,* 382 U.S. 406, 415. "First, the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.'"

As pointed out in *Malloy* (at 9), the "marked shift to the federal standard in state cases" reflected a return to the view that the privilege against self-incrimination is one of the "principles of a free government" not just a rule of evidence. The state is, of course, free to regulate procedures under which its laws are carried out, including creation of presumptions and imposition of the burden of proof, "unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Speiser* v. *Randall,* 357 U.S. 513, 523. See *Tot* v. *United States,* 319 U.S. 463.

There cannot be the slightest doubt that the privilege against self-incrimination is "fundamental"—one of the "principles of free government." Nor can there be the slightest doubt that where the burden of proof lies will almost certainly be decisive of the outcome on an issue such as this. As pointed out above, and by this Court in many cases, an inescapable consequence of secret inquisitions is a dispute as to police brutality leading to the confession,

with the defendant's word contradicted by that of many police officers (see *supra*, at p. 11). Undoubtedly imposition of the burden on the defendant aids the prosecution, but it subjects the defendant to hardship and oppression.[19] See *Morrison* v. *California*, 291 U.S. 82, 88-89. Where there are at stake values so transcending as the defendant's life and liberty and the privilege against self-incrimination, in fundamental fairness the "margin of error" in fact finding must be "reduced as to him [the defendant] by the process of placing on the other party the burden of producing a sufficiency of proof. . . ." *Speiser* v. *Randall*, *supra*, at 525. It is for the reason that these values are so fundamental that the *Miranda* opinion placed on the prosecution the burden of establishing the "prerequisites to the admissibility of any statement made by a defendant," *i.e.*, "The warnings required and the waiver necessary." This indeed was stated to be a heavy burden (at 475-476).[20]

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[19] "Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden [of establishing waiver of *Miranda* requirements] is rightly on its shoulders." *Miranda* v. *Arizona*, 384 U.S. 436, 475. See Note, *Developments in the Law—Confessions*, 79 Harv. L. Rev. 938, 1069-1072 (November, 1965).

[20] See also opinion of Justice Clark dissenting in three cases and concurring in the fourth in *Miranda* v. *Arizona*, *supra*, at 503: *"In the absence of warnings, the burden would be on the State to prove* that counsel was knowingly and intelligently waived or *that in the totality of the circumstances, including the failure to give the necessary warnings, the confession was clearly voluntary."* (Emphasis supplied.) See also cases holding that state prosecutions have the burden of proving consent to a search: *e.g. Simmons* v. *Bomar*, 349 F.2d 365 (6th Cir., 1965) *per curiam*; *Maxwell* v. *Stephens*, 348 F.2d 325, 336 (8th Cir. 1965) *cert. denied*, 382 U.S. 944, *rehearing denied*, 382 U.S. 1000; *Hubbard* v. *Tinsley*, 336 F.2d 854, 855 (10th Cir. 1964).

Moreover, there is no such rational connection between the fact that a defendant confessed and a presumption of voluntariness as would justify such a presumption or burden. See *Tot* v. *United States, supra,* at 467-468. The case at bar is a case in point. It is contrary to common experience to suppose that Johnson, who denied guilt during the eight and one-half hours of detention prior to his confession, would voluntarily confess to these crimes, for which the penalty is death, were it not for the fact that he was injured, alone in a police-dominated atmosphere and subject to the complete control of the police, without friends, advisers or counsellors, not advised as to his rights and ignorant of his rights and the consequences of a confession.

Plainly where constitutional safeguards for principles of free government are involved, the prosecution should have the burden of proving compliance with them. Consistent therewith the prosecution should have the burden of proving beyond a reasonable doubt[21] the absence of inherently coercive circumstances leading to the confession and that in the totality of the circumstances the confession was voluntary. Particularly in a case such as this, where it is plain that there was no warning, the burden should be on the prosecution, and not, as the opinion below flatly states, on the defendant.

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[21] There seems to be little question but that the standard to be applied by the jury in determining this issue should be that of "reasonable doubt." See *infra,* at p. 30. And see *Clifton* v. *United States,* 371 F.2d 354 (D.C. Cir.) *cert. denied,* 386 U.S. 995 (1966); *U.S.* v. *Inman,* 352 F.2d 954 (4th Cir., 1965). Because we are dealing not with an ordinary ruling on evidence but with the constitutional privilege against self-incrimination the standard to be applied by the Trial Judge should also be that of "reasonable doubt". See *Clifton* v. *United States, supra,* concurring opinion of Circuit Judge Leventhal, at 360. See also *Bram* v. *United States, supra,* at 549 and 565; *Harrold* v. *Territory of Oklahoma,* 169 Fed. 47, 53-54 (8th Cir., 1909).

IV.

The Failure of the Trial Court to Submit to the Jury the Issue of the Voluntariness of the Confession Violates Due Process of Law Under the Fourteenth Amendment.

The Trial Judge failed to follow the Massachusetts procedure of submitting to the Jury the issue of the voluntariness of Petitioner's confession, after having resolved this issue against Petitioner. No instruction at all was given on the issue of voluntariness (A. 207-239).

> ". . . I would be far more troubled about constitutionality should either a State or Federal Government declare that a jury in trying a defendant charged with crime is compelled to accept without question a trial court's factual finding that a confession was voluntarily given. Whatever might be a judge's view of the voluntariness of a confession, the jury in passing on a defendant's guilt or innocence is, in my judgment, entitled to hear and determine voluntariness of a confession along with other factual issues on which its verdict must rest. . . . Yet, of course, the jury passing on guilt or innocence must, under any fair system of criminal procedure, be allowed to consider and decide whether an offered confession is voluntary in order to pass on its credibility." *Jackson* v. *Denno*, 378 U.S. 368, Justice Black dissenting in part and concurring in part, at 401 and 404.

At the very least, a jury should be instructed to consider, on the confession's weight or credibility, the factors which

this Court has held are relevant to its voluntariness.[22] That nothing less will satisfy concepts of fundamental fairness under the Due Process Clause is abundantly clear from the effect of the failure to instruct in this case. The Trial Judge, having heard disputed testimony at the *voir dire,* found that Petitioner failed to sustain the burden of proving the confession to have been involuntary. The Jury received the confession without any instruction to consider the numerous facts before them bearing on voluntariness (see *infra,* at p. 32) in determining either voluntariness or credibility. Thus, the confession, which was a catalogue of admissions of the essential ingredients of each crime charged, had before the Jury a degree of conclusiveness exceeding even that which the Trial Judge might have given it had he been the trier of facts of guilt. For he, at least, would have weighed in the balance the facts suggesting it was involuntary. But without instruction the Jury could not do so, and Petitioner became the instrument for furnishing against himself proof of guilt with an artificial conclusiveness.

Surely this was not a "fair system of criminal procedure" and does not comport with concepts of fundamental fairness. This Court has recently held in *Sims* v. *Georgia,* —— U.S. —— (1/23/67), that the constitutional rule on determination of voluntariness "allows the jury, if it so chooses, to give absolutely no weight to the confession in determining the guilt or innocence of the defendant. . . ." Obviously the rule can be effectuated only if the Trial Judge instructs on this vital issue. "*Jackson* v. *Denno,*

[22] Questions of credibility are for the jury (*Jackson* v. *Denno, supra,* at Footnotes 12 and 13); but that case does not make it clear that such an instruction is constitutionally required.

means that the judge and jury must each make an independent judgment of voluntariness of an admission, the judge for purposes of admissibility and the jury for evidentiary acceptability, credibility, and weight," *Pinto* v. *Pierce*, —— U.S. —— (10/23/67), *per curiam*, Justice Fortas concurring.

Some instruction on voluntariness was essential. The Petitioner urges that a jury must be instructed not to consider the confession in their deliberations on guilt if they are not convinced beyond a reasonable doubt that it was voluntary. *Stevenson* v. *Boles*, 331 F.2d 939 (4th Cir., 1964), *affirmed per curiam*, 379 U.S. 43; *United States* v. *Inman*, 352 F.2d 954 (4th Cir., 1965); *Clifton* v. *United States*, 371 F.2d 354 (D.C. Cir.) *cert. denied*, 386 U.S. 995 (1966). (See footnote 20, *supra*, for "reasonable doubt" standard.) An instruction merely to consider voluntariness on the weight to be given a confession (unless it specifies that they are to give it no weight at all if they are not convinced it was voluntary) would not suffice because it would allow the jury to use a confession which they believe to be true even though they are not convinced it was voluntary. The privilege against self-incrimination involves values so fundamental that a jury should not be permitted to use a confession to any extent where they have any reasonable doubt as to its voluntariness.[23]

Such an instruction is essential not only because of the transcending value of the privilege against self-

[23] This is so notwithstanding that under *Jackson* v. *Denno*, the Trial Judge, in order to present a clear decision on the issue free from considerations of innocence or guilt, has already passed on admissibility. In effect, we urge the Massachusetts Rule. See Appendices in *Jackson* v. *Denno*, *supra*, for rule followed in various jurisdictions.

incrimination but because both the United States Constitution and the Constitution of Massachusetts (Article XII)[24] "establish trial by jury of criminal charges as a bedrock safeguard of the people's liberties." *Jackson* v. *Denno, supra,* Justice Black dissenting in part and concurring in part, at 405. "The jury is the traditional and preferred arbiter of facts." *Pinto* v. *Pierce, supra,* Justice Fortas concurring. The jury's role in determination of this vital issue should not be diluted (or, indeed, as in the case at bar eliminated altogether) by the independent determination which *Jackson* requires of the judge; *Jackson* v. *Denno* does not stand for such a proposition.[25]

The opinion below assigns two reasons why the Trial Judge was not required to follow the customary Massa-

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[24] "[N]o subject shall be . . . deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment . . . without trial by jury." Constitution of Massachusetts, Article XII.

[25] Moreover, the Jury should consider the issue with the burden of proof of showing voluntariness on the prosecution. The importance of this is demonstrated by the Massachusetts rule that: "When a defendant in a criminal case voluntarily takes the stand he waives his privilege against self-incrimination to the extent that he renders himself liable to cross-examination on all facts relevant and material to the crime with which he is charged." *Jones* v. *Commonwealth,* 327 Mass. 491, 493 (1951). The combination of the Massachusetts rule on burden of proof and the severe consequences of taking the stand on the voluntariness issue, places a double burden on the defendant (even in the case at bar while evidence on voluntariness was before the Jury through one or another circumstance, including fortunate cross-examination [see *infra,* at p. 32], they did not hear the defendant). One can easily imagine a case where the only evidence to carry a defendant's burden would come if the defendant were to take the stand on voluntariness and in these circumstances the privilege against self-incrimination would be hollow indeed and the defendant's right to have a jury pass on the issue might be, as a practical matter, meaningless.

chusetts procedure in this case. First, it states twice that there was no evidence before the Jury on the issue of voluntariness. But this is plainly contradicted by the record. Quite apart from the evidence introduced by the defendant Johnson at the *voir dire* hearing which was not presented to the Jury, there was before the Jury sufficient evidence for it to find that Johnson's statement was not made voluntarily. The Jury heard testimony that the statement was made while Johnson was in custody and in the presence of four police officers (A. 191) at Boston Police Headquarters at 5:50 A.M. in the morning (A. 201), some eight and one-half hours after Johnson was taken into custody (A. 79). The evidence indicated that Johnson had been in police lineups many times during this period of detention, that he obviously had little or no sleep, was bleeding during much of the period of detention from various cuts and scrapes and had bruises on his head and other parts of his body (A. 28-30, 36-38, 41-46, 48-51, 60-61). The Jury could find that, although Johnson was bleeding from the back of his head when booked at about 9:30 P.M., he had no swelling, bruises or cuts on his face at that time (A. 78. 80, 83, 86) but that later in the evening while in the lineups he had blood on the right side of his face (A. 42-43) and on his nose and mouth (A. 49-50) and his cheek was swollen (A. 50) from which the Jury might deduce that he received these added injuries while in custody. It appeared from the evidence before the Jury with respect to the taking of the confession that Johnson was not warned of his right to remain silent and that his answers might be used against him nor was he informed of his right to counsel (A. 191-201 esp. at 201). All this evidence was before the Jury and was relevant to the issue of the voluntariness of Johnson's statement.

Secondly, the opinion holds that Petitioner's conduct of his case "indicates a deliberate decision not to press the issue of involuntariness when it could have been raised seasonably before the jury" [26] (A. 339). The opinion arrives at this conclusion because Petitioner's trial counsel failed to refer to the issue in his argument to the Jury and to take exception to the Trial Judge's charge. The opinion reasons that counsel must have made this decision first because there was no evidence before the Jury on this issue and second because the "alternative was to revive and emphasize the issue by having the judge instruct the jury that, having heard the evidence on the *voir dire*, he had determined that the statement was voluntarily made. . . ."

It has already been pointed out above that there was ample evidence before the Jury on the issue of voluntariness. To the extent the opinion rests its implied waiver on this conclusion, it is obviously in error. Moreover, prior to this case there appears to be no Massachusetts case holding that the judge must instruct the jury as to his own conclusion on voluntariness (see *United States* v. *Inman*, 352 F.2d 954 (4th Cir., 1965)); none of the cases cited in the Supreme Judicial Court's opinion stand for that proposition. To the extent waiver is implied from this assumption as to trial counsel's state of mind, it is unwarranted.

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[26] If the burden of proof is truly on Petitioner and there was no evidence before the Jury on the issue of voluntariness, as held by the Supreme Judicial Court, there should have been no necessity for it to discuss whether trial counsel impliedly waived this issue—the short answer would be that he would not have been entitled to an instruction on this issue had he requested it. The very fact that the opinion discusses, and relies on, waiver suggests the difficulties inherent in the holdings on burden of proof and the state of the evidence before the Jury.

If this is, in fact, the Massachusetts rule it places a further heavy burden on the defendant.

As indicated, neither of the assumptions upon which the Court's implied waiver is founded, are justified on the record or the state of the law of Massachusetts. Nor should the Court imply waiver of a constitutional right merely from the failure of Petitioner's trial counsel to call the omission from the charge to the attention of the Trial Judge (trial counsel made objection and took exceptions at the time the confession was admitted into evidence). As was stated in *Miranda* v. *Arizona, supra,* the prosecution should have a "heavy burden" in proving waiver of a constitutional right. The "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . we 'do not presume acquiescence in the loss of fundamental rights.'" *Johnson* v. *Zerbst,* 304 U.S. 458, 464. "Presuming waiver from a silent record is impermissible." *Carnley* v. *Cochran,* 369 U.S. 506, 516.

Conclusion

The Petitioner respectfully prays that the judgment of the Superior Court, on each indictment, as affirmed by the Supreme Judicial Court of Massachusetts, be set aside.

> "But where, as here, a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession. And in these circumstances this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection,

> of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment." *Payne* v. *Arkansas*, 356 U.S. 560, 568.

See also *Spano* v. *New York*, 360 U.S. 315, 324; *Lynum* v. *Illinois*, 372 U.S. 528, 537-538; *Jackson* v. *Denno*, 378 U.S. 368, 376 (1964).

Moreover, even if this Court should not determine that on undisputed facts the confession was involuntary as a matter of due process, a determination by this Court that there was error in the procedures employed below with respect to the confession, should preclude its use at a new trial by reason of the requirements set forth in *Miranda* v. *Arizona*, 384 U.S. 436. The administrative inconvenience of applying the *Miranda* rules to a new trial is minimal and is not of the kind to which the prospectivity rule in *Johnson* v. *New Jersey*, 384 U.S. 719, was directed. See *State* v. *Brock*, 100 Ariz. 168, 416 P.2d 601 (1966), *People* v. *Doherty*, 59 Cal. Rptr. 857, 429 P.2d 177 (1967), *People* v. *Jackson*, 60 Cal. Rptr. 248, 429 P.2d 600 (1967) (Traynor, *C.J.*), *State* v. *Ruiz*, 49 Haw. 504, 421 P.2d 305 (1966), *Creech* v. *Commonwealth*, 412 S.W.2d 245 (Ky. 1967), *State* v. *Shoffner*, 31 Wis.2d 412, 143 N.W.2d 458 (1966), *United States* v. *Pinto*, 259 F.Supp. 729 (D. N.J. 1966), *aff'd per curiam*, 374 F.2d 472 (3rd Cir. 1967), *Gibson* v. *United States*, 363 F.2d 146 (5th Cir. 1966). *Compare*, *Jenkins* v. *State*, 230 A.2d 262 (Del. 1967), *State* v. *Worley*, 227 N.E.2d 746 (Ill. 1967), *State* v. *Vigliano*, 50 N.J. 51, 232 A.2d 129 (1967), *People* v. *LaBelle*, 53 Misc.2d 111, 277 N.Y.S.2d 847 (Co. Ct. 1967).

The defendant prays that it be ordered that he be given a new trial, at which the statement given to Lieutenant Donovan may not be used.

Respectfully submitted,

JOHN M. HARRINGTON, JR.
225 Franklin Street
Boston, Massachusetts
Attorney for Petitioner

JOHN A. PIKE
225 Franklin Street
Boston, Massachusetts
Of Counsel

ADDENDUM

Survey of State Law as to Who Has the Burden of Proof on the Voluntariness of a Confession

I. Twenty-seven States Place the Burden on the Prosecution

Fourteen states place the burden on the prosecution, but do not indicate how much evidence is needed to satisfy that burden.

Arkansas

Payne v. *State*, 231 Ark. 727, 332 S.W.2d 233 (1960).

Kansas

State v. *McCarther*, 197 Kan. 279, 416 P.2d 290 (1966).

Maryland

Mercer v. *State*, 237 Md. 479, 206 A.2d 797 (1965).

Michigan

People v. *Boyce*, 314 Mich. 608, 23 N.W.2d 99 (1946).

Missouri

State v. *Joyner*, 382 S.W.2d 683 (Mo. 1964).

Nebraska

Parker v. *State*, 164 Neb. 614, 83 N.W.2d 347 (1957).

New Jersey

State v. *Jackson*, 43 N.J. 148, 203 A.2d 1 (1964).

New Mexico

State v. *Turnbow*, 67 N.M. 241, 354 P.2d 533 (1960).

OREGON

State v. *Schwensen*, 237 Ore. 506, 392 P.2d 328 (1964).

SOUTH CAROLINA

State v. *Gamble*, 247 S.C. 214, 146 S.E.2d 709 (1966).

SOUTH DAKOTA

State v. *Hinz*, 78 S.D. 442, 103 N.W.2d 656 (1960).

TEXAS

Hanus v. *State*, 104 Tex. Crim. 543, 286 S.W. 218 (1926).

WEST VIRGINIA

State v. *Vance*, 146 W.Va. 925, 124 S.E.2d 252 (1962).

WISCONSIN

State v. *Bronston*, 7 Wis.2d 627, 97 N.W.2d 504 (1959).

Three states require that the prosecution prove a confession voluntary beyond a reasonable doubt.

LOUISIANA

State v. *Carter*, 248 La. 730, 181 So.2d 763 (1965).

MISSISSIPPI

Lee v. *State*, 236 Miss. 716, 112 So.2d 254 (1959).

NEW YORK

People v. *Huntley*, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179 (1965).

Four states place the burden on the state but indicate that the burden is less than proof beyond a reasonable doubt.

ALABAMA

Lokos v. *State*, 278 Ala. 586, 179 So.2d 714 (1965).
Minirth v. *State*, 40 Ala. App. 527, 117 So.2d 355, *cert. denied*, 117 So.2d 360 (Ct. App. 1959) (substantial evidence of validity).

HAWAII

State v. *Foster*, 44 Haw. 403, 354 P.2d 960 (1960) (scintilla of evidence of voluntariness).

UTAH

State v. *Crank*, 105 Utah 332, 142 P.2d 178 (1943) (preponderance of the evidence).

VIRGINIA

McCoy v. *Commonwealth*, 206 Va. 470, 144 S.E.2d 303 (1965) (credible evidence).

Six states require that the prosecution lay a *prima facie* case before the confession can be admitted.

ARIZONA

State v. *Preis*, 89 Ariz. 336, 362 P.2d 660 (1961).

CALIFORNIA

Lisenba v. *California*, 314 U.S. 219, 234 (1941).
People v. *Robinson*, 61 Cal.2d 373, 38 Cal. Rptr. 890, 392 P.2d 970 (1964).

CONNECTICUT

State v. *Lorain*, 141 Conn. 694, 109 A.2d 504 (1954).

FLORIDA

Reddish v. *State*, 167 So.2d 858 (Fla. 1964).

GEORGIA

McLemore v. *State*, 181 Ga. 462, 182 S.E. 618 (1935).
Reliford v. *State*, 101 Ga. App. 244, 113 S.E.2d 473 (1960).

ILLINOIS

People v. *Wright*, 24 Ill.2d 88, 180 N.E.2d 689 (1962).

II. FIVE STATES ARE NOT CLEAR AS TO WHO HAS THE BURDEN

DELAWARE

A Delaware case indicates that it is the practice for the state to go forward with evidence to show that a confession was made voluntarily, but that it has never been decided as a matter of law who has the burden of proof. *Wilson* v. *State*, 49 Del. 37, 109 A.2d 381 (1954).

Two states indicate that before a confession may be admitted in evidence it must be shown to be voluntary; however, the cases do not state who has the burden of proof on this issue.

COLORADO

Castro v. *People*, 140 Colo. 493, 346 P.2d 1020 (1959).

PENNSYLVANIA

Commonwealth v. *Orezak*, 328 Pa. 65, 195 Atl. 45 (1937).
Commonwealth v. *Carluccetti*, 369 Pa. 190, 85 A.2d 391 (1952).

KENTUCKY

A Kentucky case which has never been overruled places the burden quite clearly on the defendant. See *Thompson* v. *Commonwealth*, 261 Ky. 356, 87 S.W.2d 968 (1935). This case, however, has never been cited for that proposition

again. A more recent case states that if a confession is shown to be voluntary it will be admitted in evidence, but there is no indication of who has the burden of proof on the issue. See *Commonwealth* v. *Mayhew*, 297 Ky. 172, 178 S.W. 2d 928 (1943).

TENNESSEE

In Tennessee the law is quite clear that where one confession has been declared involuntary, the state has the burden of proving a subsequent confession was not also involuntary. No cases were found which indicated who has the burden for the first confession. See *Williams* v. *State*, 186 Tenn. 568, 212 S.W.2d 383 (1948).

III. SEVEN STATES PLACE THE BURDEN ON THE DEFENDANT

Seven states place the burden on the defendant to prove that a confession was not voluntary.

INDIANA

Britt v. *State*, 242 Ind. 548, 180 N.E.2d 235 (1962).

IOWA

State v. *Kelley*, 253 Iowa 1314, 115 N.W.2d 184 (1962).

MAINE

State v. *Merrow*, 161 Me. 111, 208 A.2d 659 (1965).

MASSACHUSETTS

Commonwealth v. *Johnson*, 225 N.E.2d 360 (Mass. 1967).

NORTH CAROLINA

State v. *Litteral*, 227 N.C. 527, 43 S.E.2d 84 (1947).

OHIO

City of Columbus v. *Bostey*, 136 N.E.2d 426 (Ohio Ct. App. 1954).

OKLAHOMA

Petition of Pate, 371 P.2d 500 (Okla. Crim. App. 1962).

IV. ELEVEN STATES DO NOT APPEAR TO HAVE DECIDED THE QUESTION

No case was found on the subject in the following eleven states: Alaska, Idaho, Minnesota, Montana, Nevada, New Hampshire, North Dakota, Rhode Island, Vermont, Washington and Wyoming.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 782

RONALD F. JOHNSON,
Petitioner,
v.
COMMONWEALTH OF MASSACHUSETTS,
Respondent.

BRIEF FOR THE RESPONDENT.

ELLIOT L. RICHARDSON,
Attorney General,
BRIAN B. CONCANNON,
Special Assistant Attorney General,
JOHN M. FITZ,
Deputy Assistant Attorney General,
Commonwealth of Massachusetts,
State House,
Boston, Massachusetts 02132,
Attorneys for Respondent.

Of Counsel:
HOWARD M. MILLER,
Assistant Attorney General,
Commonwealth of Massachusetts,
State House,
Boston, Massachusetts.

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Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 702.

RONALD L. JOHNSON,
Petitioner,
v.
COMMONWEALTH OF MASSACHUSETTS,
Respondent.

BRIEF FOR THE RESPONDENT.

Statement of the Case.

This case is before this Court on a writ of certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts. Petitioner Ronald L. Johnson was tried before a jury, together with one Graves, in the Superior Court of Suffolk County, Massachusetts, and convicted of first-degree murder of a Boston police officer, James O'Leary. The jury recommended that the death penalty not be imposed on Graves, but made no such recommendation as to petitioner.

The facts may be summarized as follows: On the evening of August 1, 1963, Johnson, armed with a revolver, entered and robbed a Boston liquor store. After Johnson left the store, he was pursued by the manager of the liquor store and others, including police officer James B. O'Leary. O'Leary and others continued the chase until Johnson was

seen entering the passenger side of a waiting Buick convertible being driven by co-defendant Graves. O'Leary approached the automobile and ordered Graves out of the car. O'Leary then proceeded to the passenger side of the vehicle. As he did so, he was shot and mortally wounded by Johnson (A. 335-336).

Graves hurried from the car (A. 59), which was then driven away by Johnson. A description of the car as well as its license-plate number was obtained (A. 62-65) and relayed *via* police radio (A. 67) to police officers in a patrol car. The officers observed the car and driver Johnson a short time later (A. 67-69) and pursued him through several streets in the Fenway and Roxbury section of Boston. During the pursuit the car driven by Johnson struck a wall, hit four or five motor vehicles, and finally came to a halt after hitting a bus (A. 69-71). Petitioner was seen limping from the crash scene (A. 76) and shortly thereafter was apprehended in the vicinity, hiding under a porch (A. 87-88). Tests revealed that a revolver, found at the crash scene (A. 73), was the murder weapon (A. 84-85), and that Johnson had recently fired a revolver (A. 201-204). The stolen money was also recovered at the crash scene (A. 95).

The trial commenced on January 13, 1964, and was concluded on January 25, 1964. During the course of the trial petitioner objected to the introduction of a confession, and a voir-dire hearing was held to determine whether or not it had been given voluntarily (A. 96-186). The sole basis for the claim of involuntariness was alleged physical mistreatment by police (A. 188-189, 325). The trial judge found the statement voluntary and ruled it admissible (A. 325).

Thereafter, in the presence of the jury, the confession was introduced into evidence through the testimony of the police stenographer who took the statement. Defense coun-

sel objected again to the introduction but chose not to articulate his reasons for objection, merely stating that the grounds were the same as for the voir dire (A. 191).

At the close of the Commonwealth's case, Johnson chose to present no evidence. The evidence of the Commonwealth, even excluding the confession, was so persuasive that defense counsel in his summation conceded his client's guilt, saying in part:

> "I wouldn't, after listening to all this testimony, I wouldn't now try to convince you that you should find the defendant Ronald Johnson not guilty. . . .
>
> ". . . I am not about to try to insult your intelligence.
>
> ". . . I ask you only one thing, come back with a recommendation that Ronald Johnson be sentenced to prison for his natural life." (A. 205-206.)

Defendant himself then gave an unsworn statement to the jury, saying in part:

> ". . . All the evidence which the prosecutor presented to you was true.
>
> ". . . Please recommend clemency, life imprisonment." (A. 207.)

Having heard the defense summation and Johnson's unsworn statement, the trial judge instructed the jury without charging the jury on the issue of voluntariness of the confession (A. 207-239). Petitioner did not ask the trial judge to instruct the jury on the issue of voluntariness, nor did he take any exception to the charge.

Following his conviction on January 25, 1964, Johnson filed a motion for new trial on October 1, 1964. The motion was based on the principle enunciated in the case of *Esco-*

bedo v. *Illinois*, 378 U.S. 478, which had been decided subsequent to petitioner's conviction (A. 325). Attached to the motion were affidavits in which Johnson claimed for the first time that he had requested and been denied counsel (A. 242-243).

After hearing and because there was a conflict of testimony on several points of importance, the trial judge thought it appropriate to report the facts (A. 325). In his "Findings, Rulings and Order" he indicated *inter alia* that resolution of the question whether or not *Escobedo* should apply retroactively should more appropriately be resolved by the Massachusetts Supreme Judicial Court.

Included in the judge's findings of fact were the following: that Johnson had been injured prior to arrest when he collided with the bus; that he had not been beaten by police; and that he had not asked for counsel, nor been refused the opportunity to consult with counsel (A. 327-328).

In addition to these articulated findings, the trial judge also heard evidence indicating that petitioner was not inexperienced in dealing with police, nor given to meekly submitting to authority (A. 299-300, 314-315, 311-312, 313, 315-316, 322-323). When taken into custody in the present case, he repeatedly insisted that he knew his rights (A. 286-287, 295-296), and also asked challenging questions of identifying witnesses at the line-ups (A. 288-290, 303, 304, 320-321).

With respect to Johnson's physical condition at the time he gave the statement, the trial judge heard conflicting testimony about Johnson's appearance while in custody (compare A. 30, 61, with A. 37-38, 42-43, 49, 50), and learned that Johnson received medical attention shortly after his arrest (A. 81-84, 93) and that he had been given food (A. 317).

After consideration of the above evidence and having had "full opportunity to observe Johnson's mental capabili-

ties" (A. 340) when petitioner testified at the voir-dire hearing, the trial judge concluded:

> "I was satisfied by the fair weight of the evidence presented on the issue of the alleged involuntary character of the 'statement' that defendant gave it voluntarily." (A. 327.)

Thereafter petitioner appealed the conviction and the denial of the motion for new trial to the Supreme Judicial Court of Massachusetts. As regards the issues now before this Court the Massachusetts Court held that—

> 1. "There was no error in the judge's ruling at the completion of the voir dire that Johnson's statement to the police was admissible in evidence. . . . The only ground upon which the defendant objected to its admission was that it 'was involuntarily given because of physical force applied to the defendant by the police.' The question was one of fact to be decided by the judge in the first instance. The judge found, after hearing, that there had been no physical coercion of the defendant. In a statement of findings subsequently filed (*Commonwealth* v. *Cook*, Mass. , - *) the judge stated that Johnson's testimony that the statement had been made because of physical abuse or threats of abuse by the police was 'unreliable and not believable.' Since the evidence upon which the defendant relied to exclude the statement was found unworthy of belief, the judge properly concluded that the statement was admissible."
>
> 2. ". . . [T]he factors [*i.e.*, failure to warn Johnson of his rights, the mentality of the accused, and

* Mass. Adv. Sh. (1966), 1103, 1105-1106.

Johnson's physical condition at the time he gave his statement to the police] to which the defendant now points as bearing upon the voluntariness of Johnson's statement were considered and passed upon by the judge during the hearing on the motion for a new trial. In addition to the evidence introduced, the judge had full opportunity to observe Johnson's mental capabilities. He was also aware of Johnson's physical condition at the time the statement was given to the police. The Judge's extensive findings of fact show that he was not required, as matter of law, to conclude that the statement was involuntarily given. (Citing cases). The question was one of fact. The denial of the motion for a new trial shows that the judge was unpersuaded by the new evidence concerning voluntariness and left undisturbed his finding at the voir dire that Johnson's statement was 'freely and competently' given."[1]

3. ". . . The defendant's conduct of his cases indicates a deliberate decision not to press the issue of involuntariness when it could have been raised seasonably before the jury. 'It is well settled that a party cannot reserve for a motion for a new trial a point that he could have raised at the trial.' *Commonwealth* v. *Doyle,* 323 Mass. 633, 638, and cases cited. This rule has particular pertinency when the point now argued was omitted not by the oversight, but by the purpose, of counsel. The representation implied in the conduct of the defence was that the issue of voluntariness was not in controversy. The judge was

[1] On this issue the Court additionally held that these factors could have been raised at trial and it was incumbent upon the defendant to do so. His failure to raise them, coupled with the fact that the defendant chose not to pursue the issue of voluntariness, persuaded the Court that there was no error.

therefore under no duty to charge the jury on that issue. . . .."

The petitioner did not assign as error in the Massachusetts Supreme Judicial Court that petitioner's Fourteenth Amendment rights were violated because the Court imposed on petitioner the burden of proof on the issue of voluntariness (A. 331-333). Nonetheless, the opinion of the Massachusetts Court did note that, pursuant to Massachusetts law as of the date of trial, a confession was *prima facie* voluntary, and that the burden was on the defendant to show the statement was not voluntarily made (A. 337). The Massachusetts Supreme Judicial Court did not discuss the question of burden of proof in light of federal constitutional standards.

Summary of Argument.

In the totality of the circumstances, the confession of the petitioner should be declared voluntary. There was no physical coercion, and any possible psychological coercion must be viewed in the light of the individual characteristics of the petitioner and his ability to withstand pressure. Petitioner's military experiences as a guard, past criminal experience, and his continued belligerence to the police officials, during the period of interrogation, negate any inferences of coercion. Indeed, this fact situation presents a far less possible situation of coercion than in those cases where this Court has affirmed State Court findings of voluntariness. (*Infra*, at pp. 8-15.)

The Massachusetts Court, further, considered all relevant evidence on the question of voluntariness. Any lack of findings or indications in the lower Court's written decisions revealing the context in which this evidence was

considered results from the purposeful trial methods of petitioner and his counsel. (*Infra,* at pp. 15-18.)

Similarly, the issue of voluntariness was not submitted to the jury for determination because petitioner and his counsel obviously concluded that it would not be in petitioner's best interest. Instead, they conceded petitioner's guilt, choosing rather to plead with the jury not to impose the death penalty. This conclusion is additionally warranted because of petitioner's failure to present evidence in the context of voluntariness which would have allowed the jury to pass on that issue. (*Infra,* at pp. 18-20.)

Lastly, this Court should not pass on whether the burden to prove a confession involuntary may constitutionally be placed on the defendant as it was not passed on in the lower Courts. Petitioner did not assign this issue as error to the Massachusetts Supreme Judicial Court. While that Court did articulate the usual Massachusetts rule on its own volition, it did not discuss that rule in the light of federal standards, because petitioner never raised such issue. (*Infra,* at pp. 20-21.)

Argument.

I. The Confession of Johnson was Voluntary.

An examination of the record compels the conclusion that, in the totality of the circumstances, the confession of Johnson was voluntary. A determination as to whether or not a confession is voluntary must necessarily be resolved by a close examination of facts unique to the particular case in question. Respondent will demonstrate that the circumstances surrounding the confession of Johnson are such that the determination of the Court below that the confession of Johnson was voluntary should be affirmed. Indeed, the facts of this case present far less a

possible situation of coercion than the facts of cases where this Court has held coercion to be lacking. See *Stein* v. *New York*, 346 U.S. 156 (1953); *Lisenba* v. *California*, 314 U.S. 219 (1941); *Gallegos* v. *Nebraska*, 342 U.S. 55 (1951).

There was, of course, no physical coercion established, since the trial judge found as a matter of fact that Johnson's testimony that the confession had been made because of physical abuse or threats of abuse by the police was unreliable and not believable (A. 327). Furthermore, facts which might indicate mental or psychological coercion or pressure must be viewed in the light of the individual characteristics of the petitioner and his ability to withstand pressure. See, *e.g.*, *Stein* v. *New York*, 346 U.S. 156; *Lisenba* v. *California*, 314 U.S. 219.

Bearing this framework in mind, the following are the only circumstances indicating pressure or coercion.

(1) An eight-hour, overnight detention in a police-dominated atmosphere (A. 325-326);

(2) An unsuccessful attempt to give part of the *Miranda* warning (A. 286, 328);

(3) Intermittent questioning for periods of uncertain length throughout the night;

(4) Probable lack of sleep (but no indication of petitioner's normal sleeping pattern and little indication of when he last slept);

(5) Two line-ups and a confrontation with witnesses, after which petitioner was asked to explain the fact that he was identified as the perpetrator of the crime (A. 288-289, 304-306, 310-311);

(6) Bodily injuries of uncertain nature and extent (A. 326).

These circumstances of pressure must be weighed against Johnson's powers of resistance. At the time of his arrest,

Johnson was twenty-nine years old (A. 19). He had attended school to the level of grade 8 (A. 19), or, in any event, attended junior high school (A. 268). Psychometric tests performed upon Johnson approximately three months after brain surgery (A. 24, 169), at a time when his electroencephalogram was abnormal, revealed a full-scale I.Q. of 86. During his military service he was a brig guard for more than a year (A. 323). He had significant prior experience with police and criminal procedure.[2]

It is true that his I.Q., as measured under less than ideal conditions,[3] was just above the mean in the dull-normal range.[4] But the reliability of such tests, even when performed under ideal conditions, is of questionable value in determining the actual intelligence of an urban dweller in

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[2] During the hearing on motion for new trial, Johnson testified on direct examination that he had been arrested or taken into police custody on only two prior occasions: (1) when he was arrested for speeding in Foxboro, and (2) when he was "picked up and . . . turned loose at Station 10" about nine months before the arrest in question (A. 246). On cross-examination, he admitted to a February, 1963, arrest for suspicion of armed robbery (A. 264), an arrest when "I turned on my gas in my house without authority" (A. 265), an arrest when "I slapped a girl" (A. 266), and a five-hour custodial interrogation concerning a robbery (A. 283). Later during the hearing, police officers testified that Johnson was (1) Arrested in 1956 for a motor-vehicle violation in Foxboro (A. 299-300); (2) Arrested in 1958 for assault with a dangerous weapon upon a policeman (and later acquitted) (A. 314-315); (3) Arrested in 1959 for disorderly conduct (A. 311-313); and (4) Arrested (or taken into custody) in June of 1963 for homicide (A. 315). Johnson did not again take the stand to contradict this.

[3] "[Reliability] simply assumes reasonable co-operation and effort by the subject, no gross distractions. . . ." Lawyer's Guide to Medical Proof, Marshall Houts (Matthew Bender & Co., 1966), § 20.10 (8).

[4] See Lawyer's Guide to Medical Proof, Marshall Houts (Matthew Bender & Co., 1966), § 20-11, fig. 20-2.

socially and economically depressive circumstances. In any event, Johnson's practical intelligence and sophistication in police affairs far outweigh any deficiencies in his intelligence quotient. He was no stranger to criminal investigation and, in prior contacts with police, he had not been "dumb" as to his rights to the presence of the arresting officer.[5] See *Stein* v. *New York, supra.* Nor was he less outspoken on the occasion in question.[6] Also, Johnson's military experience with criminal law enforcement as a brig guard (A. 323) and as a defendant (A. 322) must have acquainted him with the scrupulously protected right to silence under the Uniform Code of Military Justice. See *Miranda* v. *Arizona,* 384 U.S. 436, 489 (1966). Further indication of his practical intelligence occurred in his reaction to being identified at the several line-ups where he tested the ability of several witnesses to identify him by asking questions much as a trial counsel would do.[7]

The record does not indicate clearly whether Johnson did any sleeping during the time between his arrest and the

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[5] *1956:* "He said he didn't have to make a call, even the law and I [a policeman] couldn't book him" (A. 300). *1958:* "Well, they'll have to prove it" (A. 315). *1959:* "I don't have to tell you . . . cops anything and I don't have to go anywhere with you . . . cops" (A. 312). "I know my rights. I don't have to answer a . . . question" (A. 313).

[6] "He said . . . he wasn't going to tell us cops anything" (A. 287). "I am not signing any . . . thing and you police can't make me sign it. I know my rights" (A. 296).

[7] "Are you sure that I am the person?" (A. 288). "Well, if there were ten . . . colored men in this line-up, could you pick me out?" (A. 289).

"Did you see me shoot the cop? . . . But you said you saw me shoot the cop" (A. 289).

"[I]f he was a long way from the car, how did he spot me?" (A. 304).

confession. However, even the complete absence of sleep during these hours would be of no value in gauging his power to resist unless there was evidence of when he had last slept prior to his arrest. For all that appears in the record, Johnson, unemployed at that time (A. 98), may have slept until noon or later on the day of the crime.[8] Under such circumstances lack of sleep during the time between his arrest and confession is of no relevance. It is true that the petitioner was injured. But the record does not indicate that he was docile, suggestible, or subject to intimidation. On the contrary, his military and criminal experience would displace any such suggestion.

The respondent does not deny that Johnson may have had some injury or that he was in a police-dominated atmosphere for most of the eight hours in custody, or that no warning of rights was given, other than the attempt, thwarted by Johnson himself, to warn him of the right to use the telephone in order to speak to a friend, relative, bail bondsman or lawyer (A. 328).[9] What the respondent does deny is that the undisputed facts and fair inferences therefrom are pieces in the picture of a broken will.

The foregoing facts present less of a possible situation of coercion or pressure than in those cases where this Court has affirmed State Court findings of voluntariness. *Stein* v. *New York, supra. Lisenba* v. *California, supra. Gallegos* v. *Nebraska, supra.*

In *Stein* v. *New York,* 346 U.S. 156, the period of detention was four times as long as the period here. The interrogation sessions totaled roughly twelve hours; here, the

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[8] The petitioner stated in the confession that he left his house early on that day, went to the Savoy for a while, and left there about half-past 2.

[9] Lieutenant Richardson testified: "and I told him that he had the right to call his attorney, bail commissioner, friends or family under 276, 33A of the General Laws" (A. 286).

actual length of sessions could not, by any stretch of the imagination, have totaled more than two and one-half hours.[10] This Court, however, held that the confession was voluntary in view of the individual characteristics of the defendant. Johnson, similarly to the petitioner in the *Stein* case, was neither "young, soft, ignorant or timid," nor was he inexperienced in the ways of crime or its detection, "nor . . . dumb as to [his] rights." *Stein* v. *New York, supra,* 185, 186.

In *Lisenba* v. *California, supra,* the petitioner was arrested on Sunday morning, held during the day, and questioned for one hour. Commencing at 7:30 p.m., he was questioned in relays throughout the night, allowed to eat breakfast and questioned again until 3 a.m. Tuesday, when he either fainted or fell asleep during interrogation. During this period he was "slapped" by a detective. He had no sleep during the first forty-two hours after arrest. Two weeks later he was questioned throughout most of the day, and, after supper, into the night. Immediately preceding his confession, he had been subjected to a six-hour period of constant interrogation. The interrogation ended when the petitioner said (at page 242): "if you fellows will take me out to eat now, I will tell you the story." His prolonged confinement without arraignment violated California law. Nonetheless, in view of petitioner's self-possession, coolness

[10] Petitioner claims that Johnson was subjected to frequent questioning and confrontations with witnesses. Yet, the only officer known to have interrogated Johnson testified (A. 181) that he saw him only "briefly" at District 10, then during the two lineups at headquarters (A. 304-306, 310-311), for a period of less than one hour, and finally for about fifteen to twenty minutes prior to the taking of the statement (A. 181). Giving a generous interpretation to the brief time period at Station 10 and including the time which Johnson gave the statement, the total time period Johnson could have been subjected to interrogation could not have exceeded two and one-half hours.

and acumen exhibited throughout the trial and questioning, this Court concluded that he had not lost his freedom of action and that his statements were not the result of his deprivation of free choice to admit, deny, or refuse to answer. Johnson displayed these same characteristics, and indeed his statements to the police (see footnote 4) are of the same nature and quality as the statement of the petitioner in *Lisenba* to the effect that there were not enough men in the District Attorney's Office to make him talk. *Lisenba* v. *California, supra.*

In *Gallegos* v. *Nebraska, supra,* the petitioner was a thirty-eight-year-old Mexican farm hand who neither spoke nor wrote English. He was arrested and detained incommunicado except for intermittent questioning by state officers for four days. No warning of rights was given and he was without benefit of counsel. Part of the time he was kept in an eight-foot by eight-foot cell with no windows, called the "dark room" or "punishment room," although he was a "docile prisoner" and did all he was told to do by the officers. The petitioner vaguely asserted that one of the rooms which he occupied for a twenty-one hour period was without a bed; that another he occupied was without light or poorly lighted; that the food was sparse, perhaps not more than a meal a day; and that he was told he might be turned over to the Mexican authorities for more severe questioning. This Court declared the confession to be voluntary, and characterized the facts as being of uncertain character and lacking definiteness. *Gallegos* v. *Nebraska, supra,* 68.

Likewise, any substantial facts pointed to by petitioner are uncertain, lacking definiteness, and therefore should be disregarded. One such fact is the extent of Johnson's injuries. Of the five witnesses who testified to seeing Johnson in the line-up, one Megna, who stood 10 to 15 feet from petitioner, unequivocally said: "No, there was not any

blood in his face" (A. 61). The others were not sure.[11] The trial judge found that Johnson was not beaten by the police (A. 327). Indeed, he found unbelievable his testimony that he was not injured before he left the Buick car. Moreover, the extent of his injuries was never clearly established, and therefore no inferences should be drawn as to his potential inability to withstand possible pressure or coercion factors. Under such circumstances the finding of the lower Courts should stand.

Lastly, there are no factors indicating "contrivance," suggested by petitioner. The attempt by the police to warn Johnson of his statutory rights under Massachusetts law, which were thwarted by Johnson's belligerence and non-co-operation, negates any suggestion of contrivance.

II. The Massachusetts Courts Determined the Issue of Voluntariness in Accordance with Proper Standards.

The trial Court considered all relevant factors in conformity with due process in reaching its determination of voluntariness. Petitioner's allegations that the trial Court failed to consider, *inter alia,* intelligence, physical condition and lack of warning are quite unwarranted in view of the record.

The evidence that the petitioner now says was not considered was before the trial Court, both at the voir dire and at the hearing on the motion for a new trial. In connection with the voir dire there was evidence of Johnson's age

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[11] Robert Gannon observed no blood on the head or face, but only some blood stains on the shirt front (A. 30). Mary Ann Taylor said Johnson was "bleeding on the head, and he was scraped and everything all over his body." A few questions later, there occurred the following: "Q: You say he was bleeding? A: I think at the knee, too." She didn't think that she observed blood on the face. She did observe blood on the right rear of the head (A. 37). She thought the blood was flowing, but was not sure.

(A. 98), education (A. 19), occupation (A. 98), physical condition (A. 30, 37, 43, 50, 61, 169, 179), apparent intelligence and temperament; the then apparent lack of any warning of rights; and the possibly coercive nature of the situation wherein Johnson was alone in a police-dominated atmosphere (A. 189, 191-192, 325).

In addition, evidence was presented to the trial judge in connection with the motion for a new trial showing Johnson's prior experience with the police, including investigations of motor-vehicle-law violation (A. 299, 300), public-utility-law violation (A. 265), assault (A. 266), armed robbery (A. 264), assault with a dangerous weapon (A. 314-315), disorderly conduct (A. 311-313), and homicide (A. 315); lack of effective warnings of constitutional rights with more particularity, as well as attempts to give partial warnings (A. 286, 328); Johnson's character and temperament, especially his defiant attitude toward law-enforcement personnel (A. 287, 296, 300, 312, 315); Johnson's activity in cross-examining identifying witnesses (A. 288, 289, 304); Johnson's food intake during the night (A. 317); and Johnson's military experience as a defendant and a brig guard (A. 322, 323).

It was only after hearing this exhaustive evidence that the trial Court reiterated its conclusion that—

> "I was satisfied by the fair weight of the evidence presented on the issue of the alleged involuntary character of the 'statement' that defendant gave it *voluntarily.*" (Emphasis supplied.) (A. 327.)

It is of course basic that a judge is presumed to have considered all evidence before him.[12] However, in this case

[12] On the question of whether or not the trial judge considered the facts relating to warning as affecting the voluntariness of the confession, the presumption is especially strong in view of the

it is not necessary simply to rely on this presumption. The record indicates that the trial judge in fact gave intelligent consideration to the relevant factors.

Petitioner further argues that, to the extent evidence was considered, it was not considered in the proper context. Specifically he contends that the issue of voluntariness at the voir dire was considered only in the context of a claim of physical beating, and that on the motion for a new trial the trial judge concerned himself only with the application of *Escobedo*.[13] Even if true, petitioner's argument is inappropriate in light of defense counsel's specifically directing the trial Court's attention to these, and only these, considerations. In essence, petitioner asks this Court to rewrite our advocacy system. He asks the trial judge to ignore the deliberate purposeful trial methods of experienced defense counsel.

Petitioner and his council had two opportunities (*i.e.*, at the trial and on the motion for a new trial) to explore thoroughly all factors on the issue of voluntariness. They had the fullest opportunity to introduce evidence and to ask the trial Court to consider it in any context they thought most advantageous. While the record amply shows that the trial judge did consider all relevant factors, it is plain that any lack of specific finding on points petitioner is now raising in the appellate Courts results from the failure of defense counsel to seek such finding or raise such

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status of Massachusetts law, even prior to *Escobedo*, which recognized the relationship of warning and presence of counsel to the voluntariness of a confession. See *Commonwealth* v. *Valcourt*, 333 Mass. 706, 711 (1956).

[13] Petitioner points to the judge's findings, rulings and order on the motion for new trial to bolster his argument that the trial judge considered only the application of *Escobedo* and not voluntariness. Of course the trial judge is not obligated to articulate all his findings in a written opinion. *Sims* v. *Georgia*, 385 U.S. 538, 544.

points in a timely fashion. Under such circumstances petitioner's argument must fail.

III. THERE WAS NO ERROR IN NOT SUBMITTING THE ISSUE OF VOLUNTARINESS TO THE JURY IN VIEW OF PETITIONER'S DELIBERATE TACTICAL DECISION NOT TO CONTEST VOLUNTARINESS BEFORE THE JURY.

Defense counsel intentionally saw fit not to raise the question of voluntariness before the jury. Examination of the record compels this conclusion, and the holding of the Massachusetts Supreme Judicial Court on this issue is so manifestly correct that the issue hardly seems arguable.

That holding was:

> "It seems clear to us from the transcript that the defendant was content to let the issue of voluntariness rest on the ruling made by the judge in the absence of the jury. The alternative was to revive and emphasize the issue by having the judge instruct the jury that, having heard the evidence on the voir dire, he had determined that the statement was voluntarily made, and by the further instruction that the jury could find that it was involuntary if there was evidence presented to them which persuaded them to that conclusion, when in fact there was no such evidence before the jury. The defendant's conduct of his cases indicates a deliberate decision not to press the issue of involuntariness when it could have been raised seasonably before the jury. 'It is well settled that a party cannot reserve for a motion for a new trial a point that he could have raised at the trial,' *Commonwealth* v. *Doyle,* 323 Mass. 633, 638, and cases cited. This rule has particular pertinency when the point now argued was omitted not by the oversight, but by the purpose, of counsel. The

representation implied in the conduct of the defence was that the issue of voluntariness was not in controversy. The judge was therefore under no duty to charge the jury on that issue." (A. 338, 339.)

Quite to the contrary, had the judge instructed the jury under these circumstances, he probably would have committed error by interfering with the deliberate trial tactic of defense counsel, and thereby impairing petitioner's right to assistance of counsel, required by the Sixth Amendment.

Of course, the petitioner had the power to waive his right to submit the issue of voluntariness to the jury (see *Johnson* v. *New Jersey,* 384 U.S. 719, 724) and the trial judge was obliged to follow petitioner's choice. The issue of waiving petitioner's right to submit the question of voluntariness to the jury was recognized by this Court in the *Johnson* case, although this factor was not in issue. However, the strategy adopted by trial counsel in that case is revealed in the State Court opinion. *State* v. *Johnson,* 43 N.J. 572, 587, 206 A. 2d 737, 745 (1965). From that opinion it is apparent that defense counsel, just as in this case, chose to concede the issue of guilt, choosing rather to plead with the jury not to impose the death penalty.

Respondent could of course concede that waiver of a fundamental right should not be found from a silent record (*Carnley* v. *Cochran,* 369 U.S. 506, 516 (1962)), but the record is hardly silent in this case, nor is it even necessary to find the strategic decision by implication. *Wilson* v. *Bailey,* 375 F. 2d 663, 665-666 (4th Cir. 1967).

Petitioner suggests that an alternative holding of the Massachusetts Supreme Court on the issue of submitting the question of voluntariness to the jury was that no evidence was presented to the jury from which they could find the statement was involuntarily made (Pet. Brf. 26). This indeed was an articulated reason of the Massachusetts Su-

preme Judicial Court (A. 338). However, rather than being in the alternative, it is only one more factor in an inextricable pattern lending to the inescapable conclusion that defense counsel deliberately chose not to pursue the issue of voluntariness. Petitioner argues that the conclusion of the Massachusetts Supreme Judicial Court that there was no evidence is not supported by the record. While petitioner has demonstrated the existence of some facts in evidence which might have been utilized in contesting voluntariness, the fact remains that petitioner in no way presented or elicited those facts in any framework that would have enabled the jury to appraise their bearing on the voluntariness of the statement. Petitioner, in fact, did not even state the grounds of his objection to the confession before the jury (A. 191).

In view of the deliberate decision of defense counsel, the decision of the trial judge not to submit the issue of voluntariness was manifestly correct.

IV. Whether the Defendant's Burden to Prove a Confession was Not Voluntarily Made would Violate the Due-Process Clause is a Question Not Properly before this Court.

It is well settled that, where a federal question is not first presented to a State's highest Court for decision and where that question is not passed on by the State Court, this Court is without jurisdiction to consider it in the first instance. *Congress of Industrial Organizations* v. *McAdory,* 325 U.S. 472, 477 (1945). See also *Shelley* v. *Kraemer,* 334 U.S. 1, 8-9 (1948); *Walters* v. *City of St. Louis,* 347 U.S. 231, 233 (1954); *Michel* v. *Louisiana,* 350 U.S. 91, 101 (1955); *McGoldrick* v. *Compagnie Generale Transatlantique,* 309 U.S. 430, 433 (1940).

Petitioner at no stage in the various State Court proceedings raised any issue as to the constitutionality of placing the burden on a defendant to prove a confession was involuntary. Petitioner now seeks to raise here for the first time a constitutional challenge which the Court below had no reason to consider in the light of the due-process clause of the 14th Amendment.

Although the Massachusetts Supreme Court did state in its opinion that the burden to prove the involuntariness of a confession rests on the defendant (A. 337), this comment was not in response to a matter in issue before the Court. More importantly, the Court did not discuss the question of burden of proof under federal constitutional requirements. *Beck* v. *Washington,* 369 U.S. 541, 549-554 (1962).

In the *Beck* case petitioner sought in this Court to challenge, for the first time, a state statute on the ground that it violates the equal-protection clause of the 14th Amendment. The State Court had discussed the interpretation of the state statute, but had not considered it in the light of federal standards. This Court held, at pages 553-554, that, since the constitutional challenge had never been raised before or decided by the State Court at any stage, "the argument cannot be entertained here under an unbroken line of precedent. *E.g. Ferguson* v. *Georgia,* 365 U.S. 570, 572 (1961); *Capital City Dairy Co.* v. *Ohio,* 183 U.S. 238, 248 (1902)." Respondent submits that the same conclusion is compelled here.[14]

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[14] Assuming, *arguendo,* that the issue is before this Court, it may very well be that its determination is implicit in the holding of *Miranda* v. *Arizona,* 384 U.S. 436, to the effect that the burden of proof is now on the Commonwealth. See Warden, *Miranda: Some History, Some Observations, and Some Questions,* 20 Vand. L. Rev. 39, 53-54 (1967); Note, 80 Harv. L. Rev. 91, 206 (1966). If that is so, it should not be applied retroactively in this case, in which the trial commenced on January 13, 1964. *Johnson* v. *New Jersey,* 384 U.S. 719.

Conclusion.

For the foregoing reasons respondent respectfully urges that the decision of the Massachusetts Supreme Judicial Court be affirmed.

ELLIOT L. RICHARDSON,
Attorney General,
Commonwealth of Massachusetts,
BRIAN E. CONCANNON,
Special Assistant Attorney General,
Commonwealth of Massachusetts,
JOHN M. FINN,
Deputy Assistant Attorney General,
Commonwealth of Massachusetts,
State House,
Boston, Massachusetts 02133.

Of Counsel:
HOWARD M. MILLER,
Assistant Attorney General,
Commonwealth of Massachusetts,
State House,
Boston, Massachusetts.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 702

RONALD L. JOHNSON,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

REPLY BRIEF FOR THE PETITIONER

JOHN M. HARRINGTON, JR.
225 Franklin Street
Boston, Massachusetts
Attorney for Petitioner

JOHN A. PIKE
225 Franklin Street
Boston, Massachusetts
Of Counsel

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IN THE SUPREME COURT OF THE UNITED STATES

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REPLY BRIEF FOR THE PETITIONER

The argument is made in the brief for the Respondent, Commonwealth of Massachusetts (at pages 20 to 21), that this Court does not have jurisdiction herein to consider whether the due process requirements of the Fourteenth Amendment forbid placing on the defendant the burden of proof on the issue of the voluntariness of his confession. This argument is based on Respondent's contentions that this constitutional challenge was not raised below and that the statement in the Massachusetts Supreme Judicial Court's opinion that the burden was on the defendant, was merely "a comment". These contentions by Respondent are not supported in law, nor indeed by the facts of the proceedings below.

A.

The Due Process Question, Unquestionably Before This Court, Necessarily Involves the Procedure Through Which the Confession Was Utilized.

The Respondent does not dispute that the issue of whether the "trial Court considered all relevant factors in conformity with due process in reaching its determination of voluntariness" is properly before this Court. See Respondent's brief, page 15. But the Respondent attempts to single out one aspect of due process, *i.e.* the burden of proof on the issue of voluntariness, as not properly here.

This Court has held that "in affirming the conviction and sentence of death, the court below necessarily determined that use of the confession did not constitute a denial of that due process which the Fourteenth Amendment guarantees." *White* v. *Texas,* 310 U.S. 530, 531. Annotation, *Admissibility of Pretrial Confession in Criminal Cases—Supreme Court Cases,* 1 L.Ed. 2d 1735, § 15. See *Turner* v. *Louisiana,* 379 U.S. 466, 470-471 and *Stein* v. *New York,* 346 U.S. 156 where the state procedures with respect to the confession were discussed at length although the affirmance of the conviction by the Court of Appeals of New York was without opinion; see also *Musser* v. *Utah,* 333 U.S. 95, 96.

When the Petitioner's confession was offered into evidence it was objected to on the grounds of voluntariness (A. 97, 189, 191) and its admission into evidence was assigned as error on appeal to the Supreme Judicial Court. Assignments 7 and 12 (A. 332-333). In admitting the confession and affirming the conviction, over the objection and assignments of error, the state courts necessarily de-

termined that there was no violation of due process. This involved approval of the entire process by which the confession was utilized including burden of proof which is an integral part of this process. In spelling out this process the Trial Judge indicated clearly and the Supreme Judicial Court stated flatly that the burden was on the defendant. See Petitioner's brief, page 23.

That burden of proof is an integral part of the process for determining voluntariness (indeed, as this case demonstrated, a singularly important aspect of such process) is emphasized by the state courts' view of their responsibility with respect to voluntariness. Because the defendant had this burden, they reasoned, their responsibility was limited to considering only matters expressly referred to by the Petitioner's trial counsel in challenging voluntariness. They postulated that they had no duty to consider other facts in the record not so referred to. Indeed, the Trial Judge carefully queried the Petitioner's trial counsel to be sure of the precise grounds of coercion relied upon (A. 189, 191) and in his Findings, Rulings and Order on the Petitioner's Motion for New Trial carefully specified that physical force was relied on at trial.

The Supreme Judicial Court recognized and affirmed the Trial Judge's limited exercise of responsibility in determining voluntariness. It stated that at trial the Trial Judge found "that there had been no physical coercion of the defendant" (A. 337). As for the factors which the Petitioner contended (citing *inter alia* *Miranda* v. *Arizona*, 384 U.S. 436, *Johnson* v. *New Jersey*, 384 U.S. 719 and *Davis* v. *North Carolina*, 384 U.S. 737) should have been considered by the Trial Judge, the Supreme Judicial Court held that:

"The factors which the defendant now points to could have been raised at the trial. It was incumbent upon the defendant to do so. The failure to raise them during the voir dire, coupled with the fact that the issue of voluntariness was not thereafter pursued at the trial, leads us to conclude that there was no error" (A. 340).[1]

The Petitioner devoted an entire section of its brief to the Supreme Judicial Court to the proposition that the Trial Judge failed to consider all factors as required by this Court. The Supreme Judicial Court rejected the argument that the Trial Judge had any such duty and its rejection was based on its holding on burden of proof.

Again, the very difference between the contentions of the Respondent and the Petitioner as to whether the issue of

[1] Both the Supreme Judicial Court (A. 340) and the Respondent in its brief to this Court (at pages 15-16) state that, although the Trial Judge had no duty to consider factors not expressly referred to by trial counsel, it did consider these factors. No basis is given for this conclusion except that the factors were in evidence and therefore presumably the Trial Judge considered them. But this conclusion is directly contradicted by the Trial Judge's statements in the record as to the issues presented to and decided by him (physical coercion, A. 97, 189, 191, 325 and *Escobedo*, A. 329-330). It is also directly contradicted by the following finding of the Trial Judge:

"I find that his willingness to talk to Lieutenant Donovan at this time was not a waiver of any 'right' he had to remain silent and to refuse to talk to the police at that time or to be cautioned by the police at that time of such 'rights', if it should be determined that in the circumstances he had any one or all of such 'rights'" (A. 329).

In the light of this position of the Trial Judge, one can hardly say that the Trial Judge considered the failure to honor these rights in determining voluntariness. It is clear, therefore, that largely because the burden of proof was placed upon the defendant, there never has been a finding of voluntariness in this case in the sense required by this Court.

voluntariness was determined below in accordance with the standards laid down by this Court illustrates that the burden of proof is an essential aspect of the process or procedure for making this determination. The Respondent contends, on page 17 of its brief, that the Trial Judge properly considered with respect to voluntariness only those matters to which "defense counsel . . . specifically direct[ed] the trial Court's attention." Respondent's brief, page 17.[2] This is directly contrary to the Petitioner's contentions, based on *Rogers* v. *Richmond,* 365 U.S. 534, and other decisions of this Court, that the Trial Judge has an affirmative duty to consider all factors bearing on voluntariness, whether or not expressly referred to by counsel. See Petitioner's brief, pages 18-22.

In overruling the Petitioner's objections and assignments of error the Supreme Judicial Court necessarily determined that imposing the burden on the defendant did not violate due process. It did so necessarily because the burden is an integral part of the process of determining voluntariness. Moreover, its rejection of the Petitioner's due process arguments that the *Miranda, Johnson* and *Davis* cases imposed an affirmative duty on the Trial Judge to consider all factors on voluntariness was based on its holding on burden of proof. In view of this Court's "ultimate responsibility" with respect to the "question whether there

[2] The Respondent's arguments on the Trial Judge's failure to instruct the jury are similar. While acknowledging (contrary to the Supreme Judicial Court's position), that there were before the jury some facts "contesting" voluntariness, the Respondent contends that the burden was on the Petitioner to establish a "framework that would have enabled the jury to appraise their bearing on the voluntariness of the statement." Respondent's brief, page 20. Again, contrary to this Court's holdings (see Petitioner's brief, page 25) the Respondent would require the defendant to shoulder the load on voluntariness.

has been a violation of the Due Process Clause of the Fourteenth Amendment by the introduction of an involuntary confession" (*Reck* v. *Pate*, 367 U.S. 433, 435), this Court has jurisdiction to consider the due process requirements with respect to burden of proof.

B.

The Due Process Issue of Burden of Proof Was Argued Below by Petitioner and Decided by the Massachusetts Supreme Judicial Court.

Not only was the due process issue of burden of proof, like all other aspects of due process relating to use of the Petitioner's confession, necessarily determined by the course of the proceedings below, but indeed, this issue was argued explicitly by the Petitioner before the Massachusetts Supreme Judicial Court.

In its brief[3] to that Court the Petitioner argued:

> "It is unclear under Massachusetts law whether the defendant has simply the burden of going forward on the issue of voluntariness (*Commonwealth* v. *McGarty, supra*) or the burden of proof as well. *Compare Commonwealth* v. *Sheppard*, 313 Mass. 590, 604 'The burden was on the defendant to show compulsion or promise of favor', *with Commonwealth* v. *Makarewicz*, 333 Mass. 575, 584 'The procedure generally followed in this Commonwealth when an alleged confession by the defendant is offered is to hold a voir dire examination

[3] This Court will look to the briefs of parties to determine whether it can be fairly said that the issue was raised below. See *Ker* v. *California*, 374 U.S. 23, 44 Footnote 15; *Beck* v. *Washington*, 369 U.S. 541, 575-576, Mr. Justice Black dissenting, Footnote 22. See also *Bryant* v. *Zimmerman*, 278 U.S. 63, 69.

in the absence of the jury on the issue of voluntariness and, if the judge finds that it was voluntary, to admit the confession and instruct the jury to disregard the confession entirely *unless they find that it was made voluntarily.*' (Emphasis supplied.) As Justice Black pointed out in his opinion concurring in part and dissenting in part in *Jackson* v. *Denno, supra* at 404-405, the Supreme Court left open the question of which party has the burden of proof on the issue of voluntariness apparently because the New York rule there involved placed the burden on the State. Justice Black left little doubt that he believed this to be a constitutional question for he stated with respect to burden of proof that 'In fashioning its new constitutional rule, the Court should not leave this important question in doubt.' See *Annotation,* 1 ALR 3rd, 1250, 1259. The Supreme Court in *Miranda* v. *Arizona, supra,* has made it quite clear that the burden of proving compliance with the rules there set forth is on the prosecution which is a strong indication as to how the Court would impose the burden of proof on the issue of voluntariness."

In answer to this argument the Respondent argued in its brief to that Court that the "statement of defendant Johnson was prima facie voluntary when offered" citing *Commonwealth* v. *Beaulieu,* 333 Mass. 640, 655 and *Commonwealth* v. *McGarty,* 323 Mass. 435, 438. In its opinion the Massachusetts Supreme Judicial Court held squarely that the burden of proof on this issue was on the defendant.[4]

[4] There was no suggestion by the Supreme Judicial Court that it would not consider this issue on the grounds that it was not raised by exception or assignment of error. In fact, of course, the Petitioner did except amply to admission of his confession and the Peti-

This was not a "comment" as the Respondent suggests but was plainly a holding of the Court in response to the arguments of the Petitioner and the Respondent. The Supreme Judicial Court in support of its holding cited the two Massachusetts cases also cited for its argument on this point by the Respondent.

The rule in *Beck* v. *Washington, supra,* and other cases cited by the Respondent, does not apply to this case. The Petitioner's argument on burden of proof, including his contentions as to constitutionality, were rejected by the Supreme Judicial Court.[5] "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley* v. *Ohio,* 360 U.S. 423, 436.

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tioner's Assignment of Error No. 13 to the Supreme Judicial Court specified that "the trial court erred in failing to instruct the jury that they should disregard Johnson's statement to Detective Lt. Donovan *unless they found it was made voluntarily.*" (Emphasis supplied.) (See also Assignment of Error Nos. 7 and 12, A. 332-333.) Indeed, it is plain from this as well as other Massachusetts cases that in a capital case the Supreme Judicial Court "in light of the broad power conferred on us under G.L. c. 278, §33E" (*Commonwealth* v. *Johnson,* —— Mass. —— (A. 338).) considers all alleged errors. "That section 'consigns the facts as well as the law to our consideration, gives us the power and the duty exercised by a trial judge upon a motion for a new trial, and requires us to consider the whole case broadly to determine whether there was any miscarriage of justice.'" *Commonwealth* v. *Kerrigan,* 345 Mass. 508, 510.

[5] "While thus casting its judgment in terms of state law, the court's affirmation of Turner's conviction necessarily rejected his claim that the conduct of the trial had violated the Fourteenth Amendment. We hold otherwise with respect to the federal constitutional issue, and accordingly reverse the judgment before us." *Turner* v. *Louisiana, supra* at 470-471. See also *Grand River Dam Authority* v. *Grand-Hydro,* 335 U.S. 359, 369-370.

C.

Imposition of the Burden of Proof on State Prosecutions Was Not One of the Miranda Guidelines to Which Johnson v. New Jersey Gave Prospective Effect Only.

The brief for the Respondent recognizes the force of the opinion in *Miranda* on the issue of burden of proof on voluntariness (Footnote 14, p. 21). However, it attempts to avoid the consequences of this recognition by incorporating into the "guidelines" of *Miranda* the foreshadowing on the burden of proof issue contained in *Miranda*. The Respondent attempts thus to apply to the burden of proof question the retroactivity rules of *Johnson* v. *New Jersey*, 384 U.S. 719.

Contrary to the Respondent's statement in Footnote 14 of its brief, however, determination of this issue was plainly not part of the *Miranda* "guidelines" to which *Johnson* gave prospective effect only. The *Johnson* case gave prospective effect to the "new standards governing in-custody interrogation" laid down in *Miranda*. "[T]hese guidelines are therefore available only to persons whose trials had not begun as of June 13, 1966" (at 734). There is not the slightest suggestion either in the language or logic of *Johnson* that imposing on state prosecutions the burden of proof on the issue of voluntariness is one of the "guidelines" to which this statement has reference.[6] Indeed, the *Johnson* case states flatly that "our case law on coerced confessions is available for persons whose trials have already been completed . . ."; this includes even the "new standards gov-

[6] *Malloy* v. *Hogan*, 378 U.S. 1 might be said to be as equally relevant to the burden of proof as *Miranda*. See Petitioner's brief, page 23. Of course, neither case constitutes a holding on this issue.

erning in-custody interrogation" of which past defendants might still avail themselves on the voluntariness test (at 730). To the extent, therefore, that the *Johnson* case addresses itself to the retroactivity of constitutional rules governing determination of voluntariness, it holds (in contrast to its holding on the *Miranda* guidelines) that such rules shall have completely retroactive effect.

Respectfully submitted,

JOHN M. HARRINGTON, JR.
225 Franklin Street
Boston, Massachusetts
Attorney for Petitioner

JOHN A. PIKE
225 Franklin Street
Boston, Massachusetts
Of Counsel



SUPREME COURT OF THE UNITED STATES

No. 702.—October Term, 1967.

Ronald L. Johnson, Petitioner, v. Commonwealth of Massachusetts. } On Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

[April 1, 1968.]

Per Curiam.

In 1964 petitioner was tried and convicted in a Massachusetts Superior Court for murder, armed robbery, and other offenses. The conviction was affirmed by the Supreme Judicial Court of Massachusetts. *Commonwealth* v. *Johnson*, —— Mass. ——, 225 N. E. 2d 360. We granted certiorari because there appeared to be substantial questions concerning the voluntariness of a confession of petitioner which was admitted in evidence at his trial. After oral argument and study of the record, we have reached the conclusion that the record relevant to the constitutional claims now asserted is insufficient to permit decision of those claims.* The writ is therefore dismissed as improvidently granted. Cf. *Smith* v. *Mississippi*, 373 U. S. 238; *Massachusetts* v. *Painten*, 389 U. S. 560.

It is so ordered.

*Petitioner's claim on *voir dire* was that his confession was beaten out of him by police. The trial judge found as a fact that it was not. At the trial itself petitioner did not attack the voluntariness of the confession on any other ground, or raise the other constitutional challenges argued in this Court. The defense at the trial was primarily directed at persuading the jury not to impose the death penalty. The petitioner made an unsworn statement to the jury at the close of summations in which he said, ". . . all the evidence which the prosecutor presented to you was true. There was no sense in my taking the stand because all the evidence points to me . . . . All that I ask is just clemency . . . . I put my life into your hands. Please recommend clemency, life imprisonment."

SUPREME COURT OF THE UNITED STATES

No. 702.—October Term, 1967.

Ronald L. Johnson, Petitioner, v. Commonwealth of Massachusetts. | On Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

[April 1, 1968.]

Mr. Justice Marshall, with whom The Chief Justice and Mr. Justice Fortas join, dissenting.

Petitioner was convicted of the first degree murder of a police officer and sentenced to death. He urges that an involuntary confession was used in evidence against him, in violation of due process.

The facts concerning the making of the statement are not in controversy. After the shooting of the police officer in the evening of August 1, 1963, petitioner drove off in a car. He was seen by other police officers who had been called to the scene by a police alarm and who proceeded to pursue him in their car. After a chase at high speeds for several blocks, during the course of which petitioner's automobile struck a wall and caromed off several parked cars, petitioner crashed into a bus. He limped away from the heavily damaged car in an attempt to flee but was almost immediately apprehended by the police.

Petitioner was taken to a police station and booked at 9:35 p. m. He was first placed in a cell and then taken to police headquarters sometime after 10:15 p. m. Between midnight and 5 a. m. he was placed in a lineup for identification purposes upon four separate occasions. During this period petitioner was constantly surrounded by large numbers of policemen. Various police witnesses estimated the number of officers present in the lineup

room alone at from 45 to 100, and at least 32 officers testified at the hearing on the new trial motion to having had some contact with petitioner during the course of the night. Numerous witnesses identified petitioner as the killer during the four lineups, although he continually maintained his innocence in the face of their accusations. Apart from the lineups, petitioner was also questioned intermittently during this period. At about 5:50 a. m., August 2, petitioner began to give the inculpatory statements, in response to police questions, that were introduced against him. It is clear that the interrogation of petitioner was carried on for the sole purpose of eliciting incriminating statements from him, since he had already been positively identified numerous times, while in lineups, as the killer.

Petitioner has a sixth-grade education and an I. Q. of 86. During the period of over eight hours in which he was in police custody prior to confessing, he was at no time advised of his right to remain silent or his right to consult with an attorney, and the trial judge found as a fact that petitioner was not aware of his rights at the time he confessed. At the time of his arrest petitioner was bleeding from a cut an inch or an inch and one-half long on the side of his head. During the various lineups to which he was subjected, petitioner constantly had blood visible on his face or head. Two doctors later examined petitioner, one on August 10, and the other on August 14. They reported the following: "He [petitioner] has headaches and dizziness when he bends down and gets up. He had a blackout spell in the police station. Things appear blurry to him. He has vomited a couple of times." Two weeks after his arrest and confession, petitioner underwent a brain operation for a subdural hematoma; the surgeon who operated on him testified that the hematoma "could have been there anywhere from one to two weeks."

On these facts the trial court found petitioner's confession voluntary, that is the result of his "free choice to admit, to deny, or to refuse to answer." *Lisenba* v. *California*, 314 U. S. 219, 241 (1941). While it is true that some of this Court's earlier decisions in voluntariness cases (relied on by the State here) are not inconsistent with such a holding, *e. g.*, *Lisenba* v. *California*, *supra*; *Gallegos* v. *Nebraska*, 342 U. S. 55 (1951); *Stein* v. *New York*, 346 U. S. 156 (1953), I had thought that more recent decisions of this Court would have made it abundantly clear that a confession obtained under the circumstances present here would be involuntary and constitutionally inadmissible against its maker. See, *e. g.*, *Culombe* v. *Connecticut*, 367 U. S. 568 (1961); *Haynes* v. *Washington*, 373 U. S. 503 (1963); *Davis* v. *North Carolina*, 384 U. S. 737 (1966); *Clewis* v. *Texas*, 386 U. S. 707 (1967).

The Court says that it finds the record in this capital case too "insufficient" to permit a resolution of petitioner's constitutional claim. I am unable to agree, since the evidence on the question of voluntariness is largely undisputed. I am particularly unable to understand the Court's disposition of this case, after full oral argument, in light of its disposition of *Greenwald* v. *Wisconsin*, *ante*, in which it finds a confession involuntary and reverses, without argument, on facts which are, if anything, less compelling on the issue of involuntariness than the facts in the present case.

To be sure, petitioner challenged the voluntariness of his confession at trial only on the theory, which was rejected, that he had been subjected to physical abuse by the police. However, in the course of the hearing on that challenge the circumstances as outlined above emerged from the testimony of the police and were specifically found as facts by the trial judge. Yet, once he concluded there had been no physical abuse, the trial

judge did not go on to consider the voluntariness of petitioner's confession in light of "the totality of the circumstances," *Greenwald* v. *Wisconsin, ante,* at —, under which it was obtained. While the Supreme Judicial Court stated that petitioner should have raised at trial the theory of involuntariness on which he now relies, its opinion reveals that it then went on to pass on that evidence itself, in the course of ruling on petitioner's request for a new trial, and found the confession voluntary. Accordingly, I do not feel that it is necessary for us to decide whether the trial judge was under a duty *sua sponte* to consider a theory of involuntariness not initially raised by petitioner, since it appears that such facts were considered and passed on in the course of appellate review in the state court.

I respectfully dissent.